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THE
CRIMINAL APPEAL REPORTS
1960

EDITED BY

T. R. FITZWALTER BUTLER

of the Inner Temple and Midland Circuit, Barrister-at-Law,
Recorder of Newark

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[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STREATFEILD
AND MR. JUSTICE DIPLOCK

B. *v.* R.

1958
Oct. 23

Child—Over Eight and under Fourteen—Mens Rea—Presumption of Innocence—Evidence Sufficient to Rebut

A boy aged just under nine was charged at a juvenile court with housebreaking and larceny. Evidence was given before the justices, and again on appeal at quarter sessions, that the boy came of a respectable family, had been properly brought up and was generally well behaved, apart from the matter wherewith he was charged.

Held, that the evidence was sufficient to rebut the presumption of innocence which arose from the boy's age and to establish *mens rea*.

Case stated by Caernarvonshire Quarter Sessions.

On January 30, 1958, the defendant, a boy aged just under nine, was found guilty by the Portmadoc Juvenile Court of breaking and entering a dwelling-house on October 25, 1957, and stealing foodstuffs and other articles therefrom. He was placed on probation for one year. He appealed to Caernarvonshire Quarter Sessions, where it was established that, when interviewed by the police in the presence of his mother, he stated that he first went to the house with a cousin on a " bob-a-job " visit. According to the statement, they knocked at the door, but got no reply. Having seen that there was nobody there, his cousin went to the window by the door. He lifted his cousin up on the window sill and his cousin pulled down the window and went in, saying: " I'm going in to see what's there." His cousin then went in and opened the back door and let him in. They were both frightened and left by the back door. His cousin took the key with him. The following afternoon the defendant went with his cousin and three other boys to the house, opening the back door with the key.

There was evidence that the boy came of a respectable family, had been properly brought up, and, apart from the present matter, was well behaved.

Quarter sessions held that the evidence was sufficient to rebut the presumption of innocence which arose by reason of the defendant's age and dismissed the appeal. The defendant appealed to the Divisional Court.

Peter J. I. Thomas for the appellant, the defendant.
W. T. Williams for the respondent, the prosecutor.

THE LORD CHIEF JUSTICE: This is an appeal by way of case stated from a decision of the Caernarvonshire Appeal Committee dismissing an appeal by the appellant from the Portmadoc Juvenile Court, which had found the appellant guilty of two housebreakings and stealing, both in the same house.

The appellant is a boy who was at the time of these alleged offences one day under nine years old, and the point of the appeal to quarter sessions and to this court is that in the case of a boy of that age the court must be satisfied that he really did have a guilty mind, and that on the facts of this case the juvenile court and the appeal committee were wrong in finding that he so had. On October 25, 1957, the appellant went with his cousin, R., aged eleven, to a house occupied by a Mrs. W., who was away. They were apparently on what is called "a bob-a-job round" and called at the house. They got no answer at the front door. They went round to the back and saw some washing hanging out, which made them think that somebody was there, so they knocked on the back door, and, there being no answer, R. asked the appellant to look and see if there was a window open. Then the case finds: "R. went to the next window by the door which was up but not locked.

The appellant lifted R. up on the window sill and he pulled down the window and went in, saying: 'I'm going in to see what's there.'" He then let the appellant in through the back door, and they looked about the house. Rather significantly the appellant in his statement said: "We were both frightened and left by the back door," but be it observed that they took away the key and later returned with other boys, and as a result of that visit it was found, on October 27, that the house was in complete chaos. Drawers had been broken open and the articles scattered, fruit juice in tins opened, apples taken, and, in particular, a gold bracelet was taken and £2 in notes and sundry other effects. The appellant was interviewed by the police in the presence of his mother and made a very frank statement of all that happened, which is, broadly speaking, all that I have set out.

There is no doubt in the case of a child between the age of eight and fourteen that there is a presumption that the child is not in possession of that knowledge of which *mens rea* is an essential ingredient, and it is to be observed that, the lower the child is in the scale between eight and fourteen, the stronger the evidence necessary to rebut that presumption, because in the case of a child under eight it is conclusively presumed he is incapable of committing crime. It has often been put in this way, that in order to rebut the presumption "guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt," or, as it has also been put, "there must be strong and pregnant evidence that he understood what he did." The appeal committee were pressed with all these considerations, and, to my mind, it is clear that they brought their minds to bear on this very point. If that be so, counsel is bound to argue that there was here no evidence of a character which would entitle magistrates to say that the presumption was rebutted. It may be that the case was rather "thin," but I cannot say that there was no evidence on which the magistrates could say that the presumption was rebutted. Indeed, there are features which point quite strongly that way. Here is a child who has had

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Parker L.C.J., Streatfeild J., Diplock J.

apparently every opportunity in life, coming from a respectable family and properly brought up, who, one would think, would know in the ordinary sense the difference between good and evil and what he should do and what he should not do. Here he is taking part, first, in the testing of the house at the back and front, climbing through the window, and on leaving taking the key and returning later with a gang, completely wrecking the house and taking certain articles. For my part, I cannot say there was no evidence on which the magistrates could come to the conclusion that this boy had guilty knowledge, and I would dismiss this appeal.

STREATFEILD J.: I agree. I think the magistrates here applied their minds to the correct principle of law, and upon the facts, as it seems to me, there was evidence, albeit it may have been a little thin, but the strength of which was for the magistrates to judge, upon which they could come to the conclusion, as they did, that the common law presumption against a mischievous intention was in fact rebutted. In my view there was material which justified the magistrates' finding.

DIPLOCK J.: I agree, without expressing any view whether I should myself have come to the same conclusion as the magistrates.

Appeal dismissed.

Solicitors: Hall, Clark & Goldhawk, for Gwyndaf-Williams & Roberts, Portmadoc; Whitfield, Byrne & Dean, for Carter, Vincent & Co., Caernarvon.

BEFORE

MR. JUSTICE BARRY, MR. JUSTICE DIPLOCK AND
MR. JUSTICE SALMON

RONALD JAMES STALLY

1959
Oct. 2

Road Traffic — Taking and Driving away Motor-vehicle without Owner's Consent — Vehicle Wrongfully Taken by Another Person—No Evidence that Defendant was Present—Journey by Defendant in Vehicle soon after Knowing it to have been Wrongfully Taken — Summing-up — Initial Taking by Other Person Part of Joint Enterprise with Defendant if Jury were to Convict — Conviction Quashed — Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 28 (1).

During the night one W. without lawful authority took a motor-van from the place where it had been parked by the owner. There was no evidence that the appellant was present at the initial taking, but the appellant soon afterwards travelled in the van with W., and made several journeys in it during the night. Both the appellant and W. were charged with taking and driving away the van without lawful authority, contrary to section 28 (1) of the Road Traffic Act, 1930. W. pleaded Guilty and the appellant Not Guilty, his case being that he had not been present when W. took the van. The jury were directed that the appellant would be guilty if he and W. had been acting in concert with regard to the original taking of the van and further that, if the appellant entered the van subsequently to the initial taking of it by W., knowing that W. had taken it without the owner's permission or other lawful authority, the appellant would still be guilty, because the offence was a continuing one.

Held, that the jury should have been directed that, before they could convict the defendant, they must be satisfied that the initial taking by W. was part of a joint enterprise with the appellant; and that, in view of the misdirection in the summing-up, the conviction must be quashed.

Appeal against conviction.

The appellant was convicted at the County of London

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Oct. 2

RONALD
JAMES
STALLY

Barry J.,
Diplock J.,
Salmon J.

Sessions on March 11, 1959, of taking and driving away a motor-vehicle without the consent of the owner or other lawful authority and was sentenced by the deputy-chairman to nine months' imprisonment.

During the night of February 14, 1959, a Bedford motor-van was taken from outside a house in Neville Road by a man named Wise. That van belonged to a Mr. Day, who had given permission neither to Wise nor to the appellant to take and drive it away. In the early hours of the following morning the van was found in a street in the East End of London and the appellant and Wise, at the time when police officers discovered the van, had, on their own showing, been in it for some time. The van had been used by the appellant and Wise to make several journeys within the London district that night. Wise pleaded Guilty and the appellant Not Guilty. The appellant's case was as follows: On the evening of February 14 he met Wise at a dance hall. They left there together and met two girls, who invited them to a party. They went to the party and at about 1.30 a.m. attempted to obtain a taxi to take the girls and themselves home. Unfortunately, one at least of the girls had drunk too much at the party and was ill, and the taxi-driver refused to take them as fares. The appellant then went off to try to find another taxi, but he was unsuccessful and ultimately returned. On his return he found Wise and the two girls in a van, not in Neville Road but in another street very close to it. According to the evidence, the engine of the van at that time had been running. The material portions of the summing-up appear in the judgment.

Kevin Winstain for the appellant: The offence was complete when Wise took the van in Neville Road, and there was no evidence that the appellant was then present. He could be guilty of the offence only if he was a party to the taking in the sense that it was the result of a joint enterprise between him and Wise. The deputy-chairman did refer to this aspect of the case and stated it was one of the grounds on which the jury, if they found he was a party to the original taking, could convict the appellant; but he introduced an alternative ground as sufficient also to constitute the offence, if the appellant had subsequently entered the van, knowing that Wise had taken it without permission. This was a misdirection.

R. D. Harman for the Crown: The deputy-chairman went too far in introducing the second or alternative ground, but there was ample evidence from which the jury could come to the conclusion that the initial taking by Wise was the result of a joint enterprise between him and the appellant and it would be fair to assume that the jury must have taken this view in convicting.

BARRY J.: The appellant was convicted at the County of London Sessions of taking and driving away a motor-vehicle without the consent of the owner or other lawful authority, contrary to section 28 of the Road Traffic Act, 1930. He was thereafter sentenced by the deputy-chairman to a term of nine months' imprisonment. He now appeals to this court on the ground that the jury were misdirected by the learned deputy-chairman on certain legal aspects of the case.

[After stating the facts his Lordship continued:] It seems clear that Wise, who pleaded Guilty, had driven the van from Neville Road to the place where the appellant entered it, the appellant not being present at that period. Indeed, Wise, who gave evidence at the trial, stated specifically that the appellant was not present when he took the van from Neville Road. There was, at any rate, no evidence adduced by the prosecution to indicate that the appellant had been present when the van was first removed.

In directing the jury, the learned deputy-chairman indicated to them clearly and with complete accuracy that, in order to find the appellant guilty, it was quite unnecessary for the appellant to have been actually in the driving seat and in control of the van at any time. It would be quite sufficient, as he very clearly pointed out, if the appellant and Wise had been acting in concert in relation to the taking of the van without the owner's consent. Unfortunately, as it appears to us, after giving this extremely clear direction, he proceeded to say: " There is another way in which [the appellant] can be guilty of taking and driving away this motor-vehicle. The law puts it in this way. If one person originally removes a motor-vehicle without the consent of the owner and drives it away, anybody else subsequently getting into that motor-vehicle, if he knows perfectly well that the driver has taken it without the consent of the owner, is guilty of the offence. So if you came to the conclusion that Wise originally removed the van from Neville Road and subsequently picked up [the appellant], and [the appellant] knew perfectly well that Wise had taken the vehicle without the permission of the owner, [the appellant] would still be guilty of the offence. Taking and driving away is a continuing offence. It goes on all the time the vehicle is being driven, so [the appellant] could be guilty in those circumstances." Again, at a later stage in the summing-up, he posed the question to the jury: " Was [the appellant] a party to this [*i.e.*, the taking of the motor-van by Wise and the driving of it away] either present and taking part in the commission of the offence at the time when the van was removed, or subsequently joining the van, knowing perfectly well that Wise had no permission to be driving it? If you are satisfied that either of these positions is the correct one, you should convict [the appellant]."

In the opinion of this court, the two passages to which I have referred state the law in very much too broad a way and, in fact, amount to a misdirection. If the learned deputy-chairman had made it clear that, once the jury were satisfied that the appellant was a party to the taking in the sense that the taking had been a joint enterprise even though he himself was not present when the vehicle was actually removed, no complaint could possibly have been made. The difficulty, as we see it, is that the learned deputy-chairman indicated to the jury that they would be entitled to find the appellant guilty of this offence on the mere ground, and the sole ground, that he entered the vehicle some time after it had been taken, knowing that the driver had taken it and driven it away without the

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Oct. 2

RONALD JAMES STALLY

Barry J., Diplock J., Salmon J.

consent of the owner. In very many cases the fact that a man entered a car which he knew had been wrongfully taken and then drove in it might well lead the jury to the conclusion that that man had been a party to the original taking in the sense that the taking had been a joint enterprise between him and the driver of the car. In the passages in the summing-up to which I have referred, the learned deputy-chairman did not direct the jury that on the evidence they must be satisfied that the appellant was in fact a party to the taking. It might well have been that on this evidence the jury would have so found, if so directed. It is, however, also possible that the jury took the view in this case that the appellant played no part at all in the taking of the van, and that, although when he came up to the van, which had already been taken by Wise, he was aware that Wise had taken it without the owner's consent, he had, nonetheless, been quite unaware that Wise was going to take it. In those circumstances, to say that the mere fact of entering the van and being driven in it would constitute a taking and driving away seems to this court to be an inaccurate statement of the law. In our view, the only possible course is to quash this conviction.

Conviction quashed.

Solicitors: The Solicitor, Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ASHWORTH AND MR. JUSTICE EDMUND DAVIES

DENNIS JOHN LONG

1959
Oct. 19

Statutory Notice of Previous Convictions—" At Least Three Days before the Trial "—Lapse of Three Clear Days Essential—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 23 (1).

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Oct. 19

DENNIS JOHN LONG

Parker L.C.J., Ashworth J., Edmund Davies J.

In order that a statutory notice of previous convictions under section 23 (1) of the Criminal Justice Act, 1948, may be valid, three clear days must elapse between the giving of the notice and the trial.

TURNER, 3 Cr.App.R. 103; [1910] 1 K.B. 346 applied.

Appeal against sentence.

The appellant was convicted at Southampton Borough Quarter Sessions on January 27, 1958, of store-breaking and larceny and was placed by the Recorder (the Hon. Ewen E. S. Montagu, Q.C.) on probation for three years. On May 27, 1959, he was convicted at Grimsby Quarter Sessions of larceny of a caravan and was sentenced to three years' imprisonment. He was brought back to Southampton Quarter Sessions in respect of the breach of probation for sentence for the original offence. On July 18, 1959, notice of intention to prove three previous convictions on indictment rendering the appellant liable to preventive detention was given under section 23 (1) of the Criminal Justice Act, 1948, and the case was put back to July 21 to enable the three days necessary under that subsection, as it was believed, to elapse. On July 25, 1959, the Recorder sentenced the appellant to eight years' preventive detention.

Patricia Coles for the appellant: " Three days " in section 23 (1) should be interpreted as meaning three clear days. This was the construction given to a similar provision in section 10 of the Prevention of Crime Act, 1908 (rep.), where seven days' notice was required in TURNER, 3 Cr.App.R. 103; [1910] 1 K.B. 346. [She referred also to CHAMBERS *v.* SMITH (1843) 12 M. & W. 2 and *Re* RAILWAY SLEEPERS SUPPLY CO. (1885) 29 Ch.D. 204.]

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: This appellant pleaded guilty at Southampton Borough Quarter Sessions in January 1958 to store-breaking, and he was placed on probation for three years. Apparently he had broken into a canteen, but left without

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taking anything. Some months later, on May 27, 1959, he was given three years' imprisonment at Grimsby Borough Sessions for the larceny of a trailer and I think nine other offences were taken into consideration. On July 25 he was brought before Southampton Borough Quarter Sessions on breach of his probation, and he was then sentenced by the Recorder to eight years' preventive detention.

The court feel that, if the matter rested there, this man, having regard to his previous record of something like twenty-one previous convictions, and to the fact that no doubt he had been warned on the last occasion by the Recorder that he would go to preventive detention, fully deserved it, and they would not interfere; but it appears that the notice of previous convictions upon which the sentence of preventive detention was based was served on him on July 18, and the trial, which was to have taken place on July 20, was adjourned to July 21, when clearly it was thought that the necessary three days had expired. Section 23 (1) of the Act provides: "For the purpose of determining whether an offender is liable to be sentenced to corrective training or preventive detention or to be ordered to be subject to the provisions of the last foregoing section"—that is section 22, dealing with supervision—"no account shall be taken of any previous conviction or sentence unless notice has been given to the offender and to the proper officer of the court at least three days before the trial that it is intended to prove the conviction or sentence;"—then these are the material words—"and unless any such previous conviction or sentence is admitted by the offender the question shall be determined by the verdict of a jury." The learned Recorder clearly took the view that if he adjourned the trial to July 21 three days would have elapsed since the service of the notice, and that accordingly the prisoner would be eligible for preventive detention.

The appellant himself in his notice of appeal raises this point and, as far as we know, it has never come before the court before. The ordinary rule applicable in these cases is that the day of service is not included, but the later date of

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the later event is included, and accordingly, if the general rule applied here, the 18th would not be included but the date of the trial, the 21st, would be. Accordingly, the trial would have taken place three days after the service of the notice. On the other hand, there are clear exceptions to that general rule. The matter is, I think, well stated in the Second (Hailsham) Edition of *Halsbury*, Vol. 32, p. 140, para. 205, where it is said: " When a period is fixed before the expiration of which an act may not be done, the person for whose benefit the delay is prescribed has the benefit of the entire period, and accordingly in computing it the day from which it runs as well as the day on which it expires must be excluded." In other words, in those circumstances the time of so many days is treated as so many clear days, and one of the cases to which Miss Coles has referred us is TURNER, 3 Cr.App.R. 103; [1910] 1 K.B. 346. There the question arose whether in the case of a man charged as being an habitual criminal notice had been given not less than seven days before the offender was to be tried pursuant to section 10 of the Prevention of Crime Act, 1908 (rep.). It is to be observed that it was there argued that the ordinary rule applied, and that if the ordinary rule applied, that is, excluding the first date and including the later one, the notice had been validly served. Channell J., in giving the judgment of the court, said this (3 Cr.App.R. at p. 157; [1910] 1 K.B. at p. 359): " Section 10 (4) (*b*) of the Prevention of Crime Act, 1908, provides that ' not less than seven days' ' notice must be given to the proper officer of the court and to the offender. The question whether the words ' not less than seven days ' mean clear days is a troublesome one to answer, as there have been decisions upon similar words which are not exactly in accord. Those decisions depend upon particular statutes and may therefore all be right and yet bring about apparently conflicting results. We have come to the conclusion that the decision most nearly in point is that in CHAMBERS *v.* SMITH (1843) 12 M. & W. 2, referred to by Chitty J. in *Re* RAILWAY SLEEPERS SUPPLY CO. (1885) 29 Ch.D. 204, where he reviewed

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the authorities. In CHAMBERS *v.* SMITH (*supra*) the words were 'not being less than fifteen days,' and the court in the first instance held that what I may call the ordinary rule applied, namely, that where a certain number of days are specified they are to be reckoned exclusive of one of the days and inclusive of the other unless clear days are expressed. But although that is the rule, the difficulty is to ascertain whether clear days are expressed by the language of the particular statute. In CHAMBERS *v.* SMITH (*supra*) the court, after having in the first instance thought that the words 'not less than fifteen days' were to be construed according to what I have called the ordinary rule, namely, inclusive of one of the days and exclusive of the other, on reconsideration came to the conclusion that they were to be construed as meaning fifteen clear days. The words upon which that decision was based are the nearest to be found in the authorities to those which we have to construe in the present case, and we therefore come to the conclusion that the provision that 'not less than seven days'' notice has to be given means 'seven clear days'' notice, and we so answer the question."

In the judgment of the court, the same interpretation should be put upon the words in section 23 of the Criminal Justice Act, 1948, and the reference to three days there should be read as a reference to three clear days. Accordingly, the appellant did not qualify for preventive detention in that the necessary notice had been given. Accordingly, the sentence of preventive detention must be set aside.

The court has carefully considered the appellant's previous history and also the offence of which he was found guilty, namely, store-breaking but without taking anything, and will substitute a sentence of five years' imprisonment which will, of course, overlap the sentence of three years' imprisonment imposed at Grimsby Borough Sessions.

Before leaving this case I should draw attention to the fact that the procedure laid down for the proof of a subsequent offence when a man is brought up for breach of probation was not observed. The matter was put by the clerk to the prisoner

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in the most general terms. He said: " Do you admit that at Southampton Borough Quarter Sessions on the 27th of January, 1958, a probation order for three years was made against you on your conviction for store-breaking with intent? "—so far, so good—then he goes on: " and that having committed a further offence you have been produced at these Sessions for sentence." The court would like to draw attention again to the necessity for following the procedure which was laid down by this court in the case of DEVINE in 40 Cr.App.R. 45 where the court emphasised that " Where a person is brought before a court for breach of a probation order, the breach alleged should be put to him in the clearest possible terms and he should be asked to say whether he admits it or not."

Sentence varied.

CIRCUIT CASE
[WESTERN CIRCUIT]

BEFORE

MR. JUSTICE DEVLIN

1959
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R. *v.* SANSBURY

Costs—Acquittal—Award—No Reflection on Conduct of Prosecution or Propriety of its Being Brought Involved — Costs in Criminal Cases Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 48), *s.* 1 (1) (*b*).

An order that the costs of a person acquitted on indictment be paid out of local funds under section 1 (1) (*b*) of the Costs in Criminal Cases Act, 1952, does not necessarily involve any reflection on the conduct of the prosecution or the propriety of its being brought.

PRACTICE NOTE (1959) 43 Cr.App.R. 219 referred to.

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R. *v.*
SANSBURY

Devlin J.

Trial at assizes before Devlin J. and a jury.

The defendant, Roger Leonard Sansbury, was acquitted at Somerset Assizes on October 21, 1959, of causing death by the dangerous driving of a motor-vehicle on a road, contrary to section 8 of the Road Traffic Act, 1956. The jury returned a verdict of Not Guilty at the close of the case for the prosecution. The prosecution was one which was properly brought. Defending counsel made an application for payment of the defendant's costs out of local funds, under section 1 (1) of the Costs in Criminal Cases Act, 1952.

N. J. Skelhorn, Q.C., and *F. C. Williams* for the defendant.
L. H. Collins for the Crown.

DEVLIN J.: I have had to consider an application by counsel for the defence that the costs of the defence should be paid out of local funds. In this case the jury returned a verdict of Not Guilty after they had heard all the relevant evidence for the prosecution, but before they had heard any evidence for the defence. There did not seem to be sufficient evidence on which the jury could have convicted even if they had been disposed to do so, and I indicated that that would probably be my view, but I desired in a case of this sort to be fortified by ascertaining the view of the jury. The question is whether in these circumstances it would be proper to make the order for which counsel for the defence has asked.

The recent pronouncement by the Lord Chief Justice in the Court of Criminal Appeal on this subject ((1959) 43 Cr. App.R. 219) has not, in my opinion, laid down any new law, but it has perhaps made it clear that the judge's discretion to award costs is rather wider than has hitherto been thought; and, in particular, it has now been made quite clear that the notion, which was very generally entertained, that an award of costs to the defence necessarily involved some reflection on the conduct of the prosecution or on the propriety of its being brought is quite wrong.

In this case the prosecution was properly brought. The investigations made by the police revealed what was apparently a prima facie case, but, after a thorough and careful cross-examination by counsel for the defence, it became clear that there was no reliable evidence that at the time of the collision the defendant was on the wrong side of the road, and counsel for the prosecution rightly conceded that without such evidence he could not ask for a conviction.

Counsel for the prosecution, in resisting the application for costs, has argued that the police would be put in an impossible position if they had to constitute themselves as arbiters or quasi-judges in deciding whether to prosecute or not. They would be put in an impossible position if that were really their duty, but it is quite wrong to think that they are placed in that position. If the order which I am being invited to make involved any censure or criticism on the police, then they might be. That, however, is not so, and I expect the police to continue to prosecute in this type of case, whenever they think it right to do so, in the future just as they have done in the past. It would be wrong if, in making their decision whether to prosecute or not, they were to be influenced by any speculation about how the judge at the trial might be likely to exercise his discretion on this question of costs.

I am not dealing with the facts as a reasonable police officer would see them at the time of the decision to prosecute, but as they have emerged after the trial or so much of the trial as has been found necessary to bring about a verdict of Not Guilty. I am satisfied not only that the defendant was not guilty of the offence with which he was charged, but that he did not in the circumstances of this case give just cause for the belief that he was, however it may have appeared to the police at the beginning of the proceedings. In those circumstances it would, in my opinion, be an undeserved hardship if the defendant had to pay a heavy bill of costs, and one in respect of which the Costs in Criminal Cases Act, 1952, is designed in a proper case to give relief. It is not a question of " costs against the police." The order that I propose to make is that the costs of the defence, just like the costs of the police, should be paid out of local funds.

There are two other points which I should mention. First, it has not been suggested in this case that the conduct of the defendant before, after or at the time of the alleged offence contributed in any way to his being placed in the dock. It has been suggested, however, that although the evidence might fall short of proving dangerous driving, it might be sufficient proof of careless driving. I say nothing at all about that. Careless driving is an offence with which the defendant can be or could have been charged, and he would then have an opportunity of making his defence to it; but it would be wrong if I were to allow the bare fact that the defendant might be guilty of an offence with which he is not charged to influence my mind, and I have not done so.

The other point is this. Counsel for the prosecution at the end of his submission rightly, in my view, presented his apologies on behalf of the prosecution for some vicissitudes, as he described them, in the course of the presentation of the case. If I regarded this order as in any sense a penalty imposed on the prosecution, then, no doubt, it might be right for me to have regard to them. But I do not so regard it; and as, whatever the shortcomings of the prosecution, and although they caused some inconvenience which might have been greater than it turned out to be in fact, they did not add to the burden of the costs which have to be borne either by the prosecution or by the defence, I have disregarded them entirely. The order, therefore, will be as I have indicated.

Order for costs of defence to be paid out of local funds.

Solicitors: Wansbroughs, Robinson, Tayler & Taylor, Bristol, for the defendant; Fryer, Bennett & Deal, Weston-super-Mare, for the Crown.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ASHWORTH
AND MR. JUSTICE HINCHCLIFFE

1959
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LAYTON *v.* SHIRES

Road Traffic — Notice of Intended Prosecution — Notice Sent by Registered Post to Defendant's Address—Defendant Away on Holiday Unknown to Police—Notice Received by Employee of Defendant Following Arrangements Previously Made — Compliance with Statute — Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 21 (*c*).

By section 21 of the Road Traffic Act, 1930: " Where a person is prosecuted for an offence under any of the provisions of this . . . Act relating . . . to careless driving, he shall not be convicted unless . . . (*c*) within . . . fourteen days a notice of the intended prosecution . . . was served on or sent by registered post to him . . ."

Where a notice under section 21 (*c*) has been sent by registered post to a defendant's address and delivery of it has been accepted by someone authorised to accept delivery of letters on his behalf, there has been compliance with the section even though the notice has not reached the defendant's hands within the statutory period of fourteen days.

BEER *v.* DAVIES, 42 Cr.App.R. 198; [1958] 2 Q.B. 187 referred to.

Case stated by Surrey justices.

An information was preferred by the appellant, Layton, a police officer, at Reigate magistrates' court, charging the respondent, Wellburn Bertram Shires, with driving without due care and attention, and alternatively without reasonable consideration for other persons using the road, contrary to section 12 of the Road Traffic Act, 1930. The alleged offences took place on August 31, 1958.

At the hearing the respondent contended that the informations were bad in that section 21 of the Road Traffic Act, 1930, had not been complied with by the prosecution. On the hearing of this preliminary issue the following facts were found. At the time and place of the alleged offence the respondent was informed by the police officer on duty that he would be reported for failing to keep to the left when meeting oncoming traffic. The summonses served on the respondent in respect of the alleged offences were served after the statutory period of fourteen days had expired. On September 10, 1958, the appellant caused a notice under section 21 to be prepared, informing the respondent that it was intended to take proceedings against him for the alleged offences. On September 11, 1958, the notice was posted by registered post to the respondent at his home address. On September 12, 1958, a registered postal packet containing the notice was delivered at the respondent's address and was received and signed for by a member of the respondent's family or by a " nanny " in his employ. The respondent, in accordance with arrangements made some time prior to the date of the alleged offences, went abroad for a holiday on September 11 and first became aware of the notice when he opened the registered packet on his return on October 1. The respondent did not inform the police of his intention to go abroad.

It was contended by the appellant that written notice of intended prosecution had been served on or sent by registered post to the respondent within fourteen days of the commission of the alleged offences, in accordance with the provisions of section 21. The appellant conceded that the verbal warning given by the police officer at the time did not satisfy the provisions of the section. The respondent contended that written notice of intended prosecution had not been served on or sent by registered post to him within the period of fourteen days.

The justices were of opinion that BEER *v.* DAVIES, 42 Cr. App.R. 198; [1958] 2 Q.B. 187, was in favour of the respondent's contention, that the provisions of section 21 with regard

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to notice of intended prosecution had not been complied with, and that in going abroad the respondent had not contributed to the failure to serve the notice within fourteen days. They accordingly decided the preliminary issue in favour of the respondent.

The prosecutor appealed.

Cur. adv. vult.

October 23, 1959. The judgment of the court was read by:

ASHWORTH J.: This is an appeal by way of case stated by justices for the Petty Sessional Division of Dorking sitting at Reigate before whom informations were preferred by the appellant against the respondent that he on August 31, 1958, did drive a motor-car on a road without due care and attention, alternatively that he drove it without reasonable consideration for other persons using the road, in each case contrary to section 12 of the Road Traffic Act, 1930.

This is yet another case raising the question whether the provisions of section 21 of the Act had been complied with. At the trial the solicitor for the respondent took the preliminary point that there had been no compliance with the section and the justices upheld that contention.

The section provides as follows: "Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating respectively to the maximum speed at which motor-vehicles may be driven, to reckless or dangerous driving, and to careless driving he shall not be convicted unless either—(*a*) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or (*b*) within fourteen days of the commission of the offence a summons for the offence was served on him; or (*c*) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence: Provided that—(i) failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the court is satisfied that (1) neither the name and address of the accused nor the name and address of the registered owner of the vehicle, could with reasonable diligence have been ascertained in time for a summons to be served or for a notice to be served or sent as aforesaid; or (2) the accused by his own conduct contributed to the failure; and (ii) the requirement of this section shall in every case be deemed to have been complied with unless and until the contrary is proved."

It is agreed that there was no sufficient warning at the time when the alleged offences were committed and the summonses were not served until the statutory period of fourteen days had expired. The sole question, therefore, is whether the provisions as to the service of a notice of intended prosecution were complied with, subject, of course, to the proviso.

The facts can be shortly stated. The respondent was not only the driver but also the registered owner of the motor-car. He lived at No. 16 Holland Park Avenue, London, W.11. On September 11, 1958, the appellant after causing the necessary notice to be prepared posted it by registered post to the respondent at that address. On the same day the respondent in accordance with arrangements made before the date of the alleged offences went abroad for a holiday and the letter was received and signed for by a member of the family or by a "nanny" in his employ. The respondent first became aware of the notice when he opened the registered letter on his return from abroad on October 1, 1958, which was of course after the fourteen days had expired.

The first question, therefore, is as to the meaning of the words "sent by registered post to him," bearing in mind section 26 of the Interpretation Act, 1889, which provides: "Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve,' or the expression 'give' or 'send,' or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post."

It is, we think, clear that ever since the decision of this court in BEER *v.* DAVIES, 42 Cr.App.R. 198; [1958] 2 Q.B. 187, the requirement of the section is not complied with if the registered letter is not taken in at the address to which it is sent and is returned. That decision, which is binding on this court, followed the decision of the Court of Appeal in R. *v.* LONDON QUARTER SESSIONS, *ex p.* ROSSI [1956] 1 Q.B. 682, and on this point departed from the interpretation put upon the words in previous decisions.

In the present case, however, the letter was in fact taken in and signed for and was not returned. It is true that the letter did not reach the hands of the respondent until after the statutory period of fourteen days had expired, but in our judgment the decisions in R. *v.* LONDON QUARTER SESSIONS, *Ex p.* ROSSI (*supra*) and BEER *v.* DAVIES (*supra*) do not compel us to hold that in such circumstances the section was not complied with. If a notice under section 21 (*c*) of the Act is sent by registered post to a defendant and delivery of it is accepted either by him or by someone authorised to accept delivery of letters on his behalf, we are of opinion that the section is complied with, even if the letter does not reach his hands within the statutory period. This view is in accordance with the decision of this court in MONEY *v.* BICKNELL (unrep.) on April 10, 1959, that is to say, after the decisions in R. *v.* LONDON QUARTER SESSIONS, *ex p.* ROSSI (*supra*) and BEER *v.* DAVIES (*supra*). Moreover, it is to be noted that section 21 (*c*) provides that a notice may be served on or sent to the proposed defendant or alternatively the person registered as the owner of the vehicle at the time of the commission of the offence. If the latter alternative is adopted, there is no certainty that the

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proposed defendant will himself become aware of the intended prosecution within the statutory period. The existence of this alternative method of complying with the section serves to confirm our opinion that actual receipt within the period of a notice addressed to a proposed defendant is not required. This is enough to decide this case and it is unnecessary to consider provisos (1) and (2).

In these circumstances the case must go back to the magistrates with an intimation that the requirement of the section has been complied with.

Case remitted.

Solicitors: Wontner & Sons for the appellant; J. B. Izod for the respondent.

BEFORE

THE LORD CHIEF JUSTICE, Mr. JUSTICE CASSELS
and Mr. JUSTICE EDMUND DAVIES

GEORGE CECIL RHODES

1959
Oct. 26;
Nov. 9

Summing up—Statement by One Prisoner Implicating Co-Prisoner — Warning to Jury Not to Regard it as Evidence Against Co-Prisoner — Evidence of Association Between Prisoners at Material Time—Jury Invited to Consider Case Against First Prisoner in Light of Alleged Admission—Jury Invited if They Convicted First Prisoner then to Consider Case Against Co-Prisoner on Footing they were in Association — Conviction Quashed.

The appellant and one M. were jointly indicted and tried for burglary. It was not disputed that they were together during the whole of the material time. A substantial part of the case against M. consisted in a statement implicating the appellant which M. was alleged to have made and which M. denied having made. The Chairman, after warning the jury that the statement could not be evidence against the appellant, invited the jury first to consider the case against M. in the

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light of his alleged admission and then, if they convicted M., to consider the case against the appellant on the footing that the two men were together at the material time. The jury convicted both M. and the appellant.

Held, that by the way in which he invited the jury to consider the case against the appellant, the Chairman was, for all practical purposes, negativing and nullifying his previous warning that M.'s alleged admission was not evidence against the appellant; that it was a misdirection to tell the jury that the conviction of M. could be regarded as forming any part of the case against the appellant; and that the appellant's conviction must be quashed.

Appeal against conviction.

The appellant was convicted at Lancashire Quarter Sessions on May 15, 1959, of burglary and larceny and was sentenced by the Chairman (His Honour Judge Steel) to seven years' preventive detention.

The appellant was indicted and tried together with a man named Mills. The offence was committed by gaining access to a cellar. Evidence was called by the prosecution to prove that the appellant and Mills had been together in the neighbourhood soon before and soon after the householder was disturbed by the noise of entry being effected. The appellant and Mills, in the course of their evidence, both said that they had been at all material times in the company of each other, but denied all complicity in the offence. The evidence against the appellant consisted of scientific evidence with regard to fragments of paint and other material found adhering to his coat which, it was said, corresponded with material found in the cellar. The evidence against Mills included a statement to a detective officer which he was alleged to have made and which he denied having made. The statement was to the following effect: "Look, if you let me go to-night, I'll put you on to some big stuff. . . . I only pulled George [Rhodes] out. If you let me go, I'll get him for you on some bigger stuff."

The Chairman directed the jury that Mills' statement was not evidence against the appellant. He continued: "If you believe that Mills made the alleged admission and consequently

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come to the conclusion that Mills is guilty of this burglary, you now note (because both the accused have said it to you on oath) that they were together the whole of the evening . . . and they never parted company. If you come to the conclusion that Mills was taking part in this burglary, where was Rhodes? Rhodes doesn't say ' I left Mills and he may have done the burglary while I was away . . .' The evidence shows that they were together before the offence was committed, together after the offence was committed, and both state on oath they were together the whole time. . . . If you are not satisfied the admission was made, the case against Mills goes, and the case against Rhodes goes also, because the case against Rhodes is not as strong as the case against Mills. But if you are satisfied Mills committed the offence and made this admission, that admission, as I told you, is not evidence against Rhodes. Once satisfied that Mills is guilty, you know that he and Rhodes were together the whole evening; that has been their evidence in this case . . . What you have to make up your minds about is, what is Mills' admission? Did he make it? Is it an admission? If he made it and you are satisfied he is guilty, both have given evidence that they did not part company that night. . . . Wherever Mills went, Rhodes went. They denied having anything to do with the burglary. But, wherever they were, they were together."

John Ward for the appellant. After correctly warning the jury that Mills' statement could not be evidence against the appellant, he nullified the effect of that warning by inviting the jury to convict or acquit the appellant according as whether they accepted it as proved that Mills' admission had been made, simply because Mills and the appellant agreed to having been in each other's company on the material evening. This amounted to a misdirection.

Ian Webster for the Crown. The Chairman made it sufficiently clear to the jury that they must consider the case against Mills and against the appellant separately, and was careful to point out twice that, even if they found that Mills had made the alleged admission, it could not be evidence against the appellant.

At the conclusion of the argument the court quashed the conviction and said that reasons would be given for their decision at a later date.

Cur. adv. vult.

November 9, 1959. The judgment of the court was delivered by:

Edmund Davies J.: At Lancashire Quarter Sessions in May 1959 George Rhodes and Martin Mills were jointly charged with burglary and both were convicted. Thereafter, by leave of the full court, Rhodes appealed against his conviction on the grounds of misdirection by the learned Chairman. On October 26 this court, being of opinion that misdirection in one respect had been established in an otherwise admirable summing-up, quashed the conviction and Rhodes was accordingly discharged.

The burglary charged had been effected by gaining access to a cellar, and evidence was called that the two accused persons had been together in the neighbourhood shortly before and shortly after the householder was disturbed by the noise of someone entering the premises. Furthermore, in the course of their evidence, both accused persons, while denying any complicity in the offence charged, said that they had at all material times been throughout in the company of each other.

The evidence against the appellant Rhodes consisted of the testimony of a witness from the Forensic Science Laboratory with regard to fragments of paint and other material adhering to his coat which, it was asserted, corresponded with material found in the cellar. As against Mills, however, the evidence was entirely different, and was to the effect that, while under arrest, he sent for a detective officer and said to him: "Look, if you let me go to-night, I'll put you on to some big stuff. . . . I only pulled George [Rhodes] out. If you let me go, I'll get him for you on some bigger stuff." Mills denied having said this, but he was convicted, and no point arises in this appeal regarding that conviction; but it was urged on Rhodes' behalf, and in the opinion of this court rightly urged, that the learned Chairman misdirected the jury regarding the way in which they were entitled to treat the aforementioned statement by Mills as affecting Rhodes.

The jury were indeed properly directed that, Mills' alleged statement having been made in the absence of Rhodes, " where a man makes a statement in these circumstances, it is evidence against him, but it is not evidence against anybody else he may have mentioned." [His Lordship then referred to the passages in the summing-up set out above and continued:] Counsel for the appellant submitted that there was here a misdirection in that, despite the twice-repeated direction that Mills' alleged admission (being made in Rhodes' absence) was not evidence against Rhodes, that direction was in effect nullified by the invitation to the jury to acquit or convict Mills according as to whether they rejected or accepted the evidence of his alleged admission and, if they convicted Mills, to convict Rhodes also, inasmuch as the appellant had himself sworn that he had been in Mills' company at all material times. In the judgment of this court, that submission was well founded. Although the learned Chairman was careful to point out that each accused person was entitled to a verdict based on the evidence admissible against him alone, it by no means followed that the conviction of Mills necessarily involved the conviction of Rhodes. The matter may be quite simply tested in this way. If Mills had already been separately tried and convicted, in the later trial of Rhodes could proof of Mills' conviction be admitted and (if so), by coupling this with evidence that the two men spent the evening together, would this be sufficient to justify the conviction of Rhodes even though he asserted that they had committed no crime? The question, in our judgment, permits only a negative answer. Indeed, any other answer would make for great injustice, for in the circumstances postulated Rhodes would have had no opportunity of challenging any of the evidence given in the trial of Mills. It is true that,

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in the present case, the two men were jointly tried, but even so the position of the appellant was no better than it would have been had they been tried separately, for he could make no effective challenge of the police evidence with regard to the admission alleged to have been made in his absence, and no cross-examination of Mills was called for on his behalf, since Mills denied ever having made the alleged admission as well as denying the offence charged.

This court has accordingly come to the conclusion that, by inviting the jury first to consider the case against Mills in the light of his alleged admission and then, if they convicted Mills, to proceed to deal with the case against Rhodes on the footing that the two men were together throughout the material time, the learned Chairman was, for all practical purposes, negativing and nullifying his previous warning that Mills' alleged admission was not evidence against the appellant. Alternatively, and more simply stated, it was a misdirection to tell the jury that the conviction of Mills could be regarded as forming any part of the case against Rhodes.

Although at first sight it might appear odd that, in the light of the evidence given by the two co-defendants themselves, one should go free while the other is convicted, proof must precede conviction, and in our judgment the offence charged, while proved against Mills, was not proved against Rhodes. For these reasons we thought it right to allow Rhodes' appeal and to quash his conviction.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS
AND MR. JUSTICE DIPLOCK

BERNARD STEWART
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Indictment — Possessing Explosives — Omission of Word "Knowingly"—Summing up—No Direction on Knowledge—Convictions Quashed — Explosive Substances Act, 1883 (46 *&* 47 *Vict. c.* 3), *s.* 4.

By section 4 (1) of the Explosive Substances Act, 1883: "Any person who . . . knowingly has in his possession . . . any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he . . . does not have it in his possession . . . for a lawful object, shall, unless he can show that he . . . had it in his possession . . . for a lawful object, be guilty of felony . . ."

In order to establish an offence under the above subsection the prosecution must prove (i) that the prisoner knew that he had the substance in his possession or under his control and also (ii) that he knew it was an explosive substance.

HALLAM, 41 Cr.App.R. 111; [1957] 1 Q.B. 569 followed.

Where, therefore, an indictment under the above subsection omitted the word "knowingly," and in the summing-up the only direction given was in regard to possession and there was no direction in regard to knowledge that the things possessed were explosive,

Held, that the indictment was defective and that the convictions must be quashed.

Appeals against conviction.

The appellants, together with two other persons who did not appeal, were convicted at Cambridgeshire Quarter Sessions on April 3, 1959, of possessing explosive substances, contrary to section 4 (1) of the Explosive Substances Act, 1883, and each of the appellants was sentenced by the Chairman (His

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Honour Judge Lawson Campbell) to seven years' imprisonment.

In the indictment the word "knowingly" was omitted and the Chairman in his summing up did not direct the jury with regard to knowledge on the part of the prisoners that the things possessed were explosive.

C. G. L. Du Cann for the appellant Stewart.
J. N. Dunlop for the appellant Harris.
W. Howard for the Crown.

THE LORD CHIEF JUSTICE: These two appellants were convicted at Cambridgeshire Quarter Sessions of possessing explosives contrary to section 4 (1) of the Explosive Substances Act, 1883, and they were sentenced to seven years' imprisonment with an order under section 22 of the Criminal Justice Act, 1948, as amended. They were charged with two other men called McVitie and Martin Harris with possessing a 4-ounce slab of plaster gelatine and four detonators. What happened was this, that a car which the appellant Stewart was driving, at the side of whom was the appellant Thomas Edward Harris, was stopped. In the back of the car were the other two prisoners, McVitie and Martin Harris, and on a shelf at the back in a fruiterer's bag were the gelatine and the detonators. There was also a drill and one of them had some silk stockings in his trousers. McVitie and Martin Harris both admitted that they were in possession of the fruiterer's bag and also that they knew that there were explosives in it. These two appellants, however, have throughout denied that they knew that any explosives were in the car, and it was said by their co-prisoners that neither of the appellants knew that there were explosives there.

The summing-up drew no particular distinction between what I may call the two lots of prisoners, the two who have appealed today and the two who are not appellants. First of all, the Chairman said: "You must be satisfied that the explosives were in their possession and you will ask yourselves, when you come to consider your verdict, were they in the possession of McVitie, Martin Harris, Thomas Harris or Stewart, or in the possession of all four of them jointly."

Of course, one of the matters that must be proved by the prosecution is that the prisoner or prisoners were in possession of the explosives. But the matter goes further because the section is in these terms: "Any person . . . who knowingly has in his possession or under his control any explosive substance," and accordingly it is in every case for the prosecution to show, first, that the prisoner in question had possession of the substance and, secondly, that he knew it was explosive. The matter was fully dealt with in HALLAM in this court (41 Cr. App.R. 111; [1957] 1 Q.B. 569) where it was held that the prosecution must prove "(i) that the prisoner knew that he had the substance in his possession or under his control and also (ii) that he knew it was an explosive substance." In giving the judgment of the court, the Lord Chief Justice, Lord Goddard, said this (41 Cr.App.R. at p. 115; [1957] 1 Q.B. at p. 572): "We think that the clear meaning of the section is that the accused must not only knowingly have in his possession the substance, but must also know that it is an explosive substance." Then later he said: "If evidence is given that the accused had the substance in his possession, and some evidence is given of circumstances which gave rise to a reasonable suspicion that he had not got it for a lawful purpose, the jury are then entitled to infer that he knew it was an explosive substance. We think the proper direction to give to a jury on this charge is that they must first of all be satisfied that the accused had the substance in his possession. Secondly, they must be satisfied that it was in his possession under circumstances such as to give rise to a reasonable suspicion that he had it in his possession not for a lawful object."

Here, as appears from the passage which I have read, the only direction given was in regard to possession and not in regard to the knowledge that the thing possessed was an explosive. Mr. Du Cann points out that it would appear from the charge read at the trial that the word "knowingly," the

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vital word, had been omitted from the charge, and, on seeing the indictment itself, it appears that that is so. It may be that that omission was the reason why the learned Chairman failed to deal with the issue of "knowingly." However, there it is, the indictment itself was wrongly drawn and there was no direction upon this vital matter.

It may be that these two appellants are extremely fortunate. It may well be that if the word "knowingly" had been in the indictment and the matter had been dealt with in the summing-up by the learned Chairman, the jury would have felt bound to come to the conclusion that they were guilty. However, the court fails to see how this is a case in which they can properly apply the proviso, and accordingly this appeal must be allowed and the convictions quashed.

Convictions quashed.

Solicitors: Lincoln & Lincoln for the appellants.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE SALMON

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Evidence—Hearsay—Larceny—Statement to Prisoner by Employee Arrested on Same Charge—Employee not Called as Witness—Admissibility—Relevancy to Prisoner's State of Mind.

The appellant was convicted of larceny. At his trial he desired to give evidence of a statement made to him by one of his employees who had been arrested on the same charge. The employee was not called as a witness. The trial judge excluded the evidence as hearsay.

Held, that the evidence was admissible if relevant to the appellant's state of mind at any time, and in the present case it was relevant to his state of mind when he later made a

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statement to the police and therefore should have been admitted, but that, inasmuch as even if the evidence had been admitted, any properly directed jury would, in the opinion of the court, have been bound to return the same verdict, the court would apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and affirm the conviction.

Subramaniam *v.* Public Prosecutor [1956] 1 W.L.R. 965 applied.

Appeal against conviction.

The appellant was convicted at Berkshire Quarter Sessions on July 3, 1959, of larceny and was sentenced by the Deputy-Chairman (His Honour Judge Duveen) to eighteen months' imprisonment.

The appellant was the owner of a scrap metal business at Southend. He had a contract with the Atomic Supply Authority at Aldermaston, Berks, to remove scrap every week. It was his practice to go to Aldermaston in his car, accompanying the lorries which collected the scrap. He left the loading to his foreman, one Napper. On January 19, 1959, two lorries went to Aldermaston. Napper instructed one of the appellant's drivers, who was also convicted of larceny, to load a drum of cable valued at £550 on to one of the lorries, where it was covered by scrap and a tarpaulin. The next day the two lorries returned to Southend, where they were unloaded in the appellant's yard. The appellant himself did not return there till after dark, and the next day—according to the appellant, before he arrived at his office—the lorry left the yard with the cable and took it to the premises of another firm with which the appellant did business. Napper confessed to stealing the cable, but the appellant maintained that he had nothing to do with the loading and never realised that the drum had been loaded. On January 21 the appellant saw Napper, who was in custody, and a conversation took place. The defence sought through the appellant to give evidence of what had been said by Napper to the appellant. Napper was not called as a witness. The Deputy-Chairman ruled that the evidence was hearsay and inadmissible.

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Edward Clarke for the appellant: The evidence sought to be given was that Napper had told the defendant that he had not been guilty of any offence and had not taken the cable to the customer. This was relevant in relation to the appellant's state of mind and subsequent conduct, particularly with regard to his failure to give a true statement to the police, and should have been admitted. The Deputy-Chairman severely commented on the appellant's failure to give a true account to the police and it is submitted that these comments would not have been made if the evidence had been admitted.

K. Jones for the Crown: The evidence against the appellant was overwhelming and even if the evidence which was excluded was admissible and had been admitted, it could not have made any appreciable difference to his case. It is submitted that no substantial miscarriage of justice arose as a result of the exclusion of this evidence, and the court is invited to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

THE LORD CHIEF JUSTICE: This appellant was convicted at the Berkshire Quarter Sessions before the Deputy-Chairman of larceny and was sentenced to eighteen months' imprisonment. He now appeals by leave of the court against his conviction.

It is necessary in order to understand the position to state the facts in a little detail. The appellant is in business at Southend as a dealer in scrap metal. He has a number of lorries and he employs a number of lorry drivers, and in particular he employed a man called Boulton as a lorry driver and a man called Napper, who was what was called the outside foreman. His business had a contract with the Atomic Energy Authority to remove scrap weekly from Aldermaston, and it was his practice to go down there in his car accompanying such lorries as were necessary once a week to collect the scrap. His evidence was that he left the actual collection of the scrap and of loading up to the foreman, Napper, and that he himself was only concerned with seeing the officials of the Atomic Energy

Authority and inspecting any property which from time to time they were prepared to sell.

On January 19, 1959, two lorries, three drivers, Napper and the appellant, all went down to Aldermaston. His evidence was that while he was seeing various people about the place, Napper was responsible for the loading, and there is no doubt that Napper instructed one of the drivers, Boulton, who was incidentally convicted also, to load a large and valuable drum of cable. That was put on one of these lorries. It was packed round with scrap metal and a tarpaulin put over it. Towards the end of the day the two lorries went over the weighbridge. The appellant followed in his car and the procession went to an inn known as the Hare and Hounds, where it was the practice for the party to spend the night. The lorries were parked outside the inn. The drivers, Napper, and the appellant stayed there, and the next morning the appellant and Napper, who had business of their own elsewhere, went their separate ways. The lorry with the drum of cable was driven back to the yard at Southend. The evidence is that there it was unloaded. That was on the afternoon of January 20. After dark that evening the appellant got back to his yard at Southend. The next morning, according to him before he arrived at the office, a lorry had left with this particular drum of cable going to Watford to a company known as the Brookside Metal Company, of which Mr. Stock was the manager.

Napper confessed to having stolen that drum of cable, and the whole question in the trial which followed of Boulton and Willis was whether they in their respective capacities had been acting in concert with Napper. The appellant maintained what was not contradicted, that he had nothing to do with the actual loading. He said that, although he had gone with the lorries to the Hare and Hounds, he never realised that there was this valuable drum of cable on one of the lorries. He said he never saw it in the yard; that it was dark when he got back to Southend in the evening; and that the cable had gone by the time he got down there the next morning.

The prosecution case against the appellant, on the other hand, was first based on this, that if Napper was acting on his own and not on the instructions or in concert with a fraudulent employer, he was taking a quite fantastic risk because he was doing everything right under the eyes of his employer who, if an honest man, would have handed him over to the police at once. Added to that, he took a drum said to be worth £550—it contained 40 per cent. copper—to an old customer of his employer, the Brookside Metal Company, where if payment was to be made it would be payment made to his employer, and therefore he, Napper, stood to get nothing out of it.

The second part of the prosecution case was based on the appellant's failure to give candid answers to the police. The position with regard to that was that on January 21 Mr. Stock rang up as soon as the drum had arrived and said it had arrived. The appellant said that he had no idea it was a drum of cable which had come from Aldermaston, but thought he referred to some cable which had been inspected some few days before. That same afternoon the police arrived. Sergeant Rickwood questioned him. He denied having taken the drum from Aldermaston. The yard was searched. It was not there, and the appellant said it was quite impossible for it to be there without his knowing it. Then followed another conversation with Mr. Stock, and it is perfectly clear that Mr. Stock then told the appellant that he had seen the cable; that it was a very valuable one and contained 40 per cent. copper; and that the appellant was forced to admit that as soon as that occurred he suspected that it was a stolen drum. Still on January 21, about 10 p.m. he saw his foreman, Napper, who was in custody and a conversation took place, and it is as a result of a ruling given with regard to that conversation that this appeal comes before the court. Mr. Clarke, who was defending him, raised the question whether he was allowed to ask and the witness was allowed to answer what Napper had told him in that conversation. It was said that evidence of that conversation was material in considering the appellant's subsequent conduct and the answers that he gave to the police,

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which were to the effect that he knew nothing about the stolen drum of cable. The matter was argued in the absence of the jury, and in the end the Deputy-Chairman ruled that the evidence was inadmissible.

This court is of opinion that that ruling was wrong. It is quite clear that evidence of what somebody else has said who is not called as a witness may be perfectly good evidence of the state of mind in which the prisoner was. In a recent case in the Privy Council of SUBRAMANIAM *v.* PUBLIC PROSECUTOR [1956] 1 W.L.R. 965 is was held that the state of mind of a man charged with possessing ammunition contrary to certain regulations could be proved by what had been told him in that case by certain terrorists into whose hands he had come. At p. 970 Mr. De Silva, giving the advice of the Board, said this: " In ruling out peremptorily the evidence of conversation between the terrorists and the appellant the trial judge was in error. Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."

In the opinion of this court, that statement of the law is applicable to the position in the present case. It is true that the Board were there considering the state of mind and conduct of the prisoner at the time of the commission of the offence, but provided the evidence as to his state of mind and conduct is relevant, it matters not whether it was in regard to the conduct at the time of the commission of the offence or, as here, at a subsequent time to explain his answers to the police and his conduct when charged. Accordingly, it seems to this

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court that that evidence in the present case was wrongly excluded.

In those circumstances, Mr. Clarke points to the fact, as I have already said, that a great deal of the prosecution case was based on the answers that he gave to the police, and he has drawn attention to a number of passages in which the Deputy-Chairman in his summing up stressed the matter. It is perhaps sufficient to refer only to one of the passages, occurring at the end of the summing-up. It is in these terms: "But it does not end there. He told you the reason why he did not do it was because he wanted to see Napper first. He saw Napper that evening, and saw Sergeant Rickwood immediately after he had seen Napper. You may ask yourselves, members of the jury, if he had decided not to tell the police until he had seen Napper, why after he had seen Napper did he not then tell Rickwood, whom he saw that evening, about the drum? You will have to consider that very carefully, members of the jury, and ask yourselves what light that throws on Willis's mentality." It appears that the evidence which the prisoner sought to give was that Napper had said that he, Napper, was not guilty of any offence and had not taken any drum of cable to the Brookside Metal Company. It is said that if that evidence had been given, a comment such as I have referred to—and there are several others—would not have been made. It seems to this court, however, that although the comment would not have taken exactly the same form, a similar comment was inevitable, namely: Was the absence of a true statement to the police consistent with this man's innocence?

This court is sparing in its application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907, but in the present case it seems to the court that the evidence here is really overwhelming and that, even if evidence as to the conversation with Napper had been admitted, any jury properly directed were bound to come to the same conclusion to which this jury did come. In the first place, it is almost inconceivable that an honest employer, even though told by his employee that nothing had been stolen and that nothing had been taken to Mr. Stock's yard, should not at once have told the police what he had been told by Stock, namely, that a drum of cable which appeared to have been stolen had come from the appellant's yard. It is almost inconceivable that on the next day when he was seen by Inspector Moyle he should have said, as I think he did, "My lorries have not been used to take any drums of cable out; I know different to that." Finally, as I said at the beginning, there was the overwhelming case against the appellant on the basis that Napper with an honest employer was taking the most fantastic risk and appeared at the end not to be in a position to obtain any advantage from it. It seems to this court that any jury, properly directed, would have been bound to return the same verdict even if this evidence had been admitted, and, accordingly, this appeal must be dismissed.

Appeal dismissed.

Solicitors: Nelson, Mitchell & Williams, Southend, for the appellant; Solicitor to Berkshire County Council for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, Mr. JUSTICE HILBERY AND Mr. JUSTICE SALMON

ROWE MORDANAM

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Sentence—Supervision Order—Consecutive Sentences—No Single Sentence for Twelve Months or More—Aggregate over Twelve Months—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 22, *as amended by the Prison Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 52), *s.* 54 *and Sched. III.*

Where consecutive sentences of imprisonment are passed and no individual sentence is for as much as twelve months, the fact that the aggregate of imprisonment is for a period of twelve months or more is not a ground for making a supervision order under section 22 of the Criminal Justice Act, 1948.

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L.C.J.,
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Application for leave to appeal against sentence.

The applicant pleaded Guilty at West London Magistrate's Court to two charges of obtaining money by false pretences and was committed to the County of London Sessions for sentence under section 29 of the Magistrates' Courts Act, 1952. On July 25, 1959, he was sentenced by the Chairman to two consecutive terms of nine months' imprisonment and a supervision order under section 22 of the Criminal Justice Act, 1948, was made.

No counsel appeared.

HILBERY J.: This applicant pleaded Guilty at the West London Magistrate's Court to two charges of obtaining money by false pretences, and he asked for eleven other offences to be taken into consideration. He was thereupon committed for sentence under section 29 of the Magistrates' Courts Act, 1952, to London Sessions. When he appeared there he was sentenced by the Chairman to nine months' imprisonment on each charge, those sentences to run consecutively, and the court made an order under section 22 of the Criminal Justice Act, 1948. He now asks for leave to appeal against sentence, and a point emerges which results in this court dealing with this application for leave to appeal by giving leave to appeal against sentence and treating this application as the hearing of the appeal against sentence in those circumstances.

In respect of each charge there was a separate sentence of nine months. The question which emerges is: Had the court imposing those sentences power to make an order under section 22 of the Act of 1948? Section 22, as amended, is in these terms: " Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person (*a*) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment; or (*b*) has been previously convicted of an offence for which he was sentenced to corrective training, the court, if it sentences him to a term of imprisonment of twelve months or more shall, unless having regard to

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the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of twelve months from his next discharge from prison be subject to the provisions of section 29 of the Prison Act, 1952."

The question which has to be determined here is whether the order made under section 22 can stand. In the view of this court, the sentence of nine months' imprisonment in respect of each of two charges does not bring the case within the ambit of section 22 so as to require that the court shall order that for a period of twelve months from his next discharge from prison the prisoner shall be subject to the provisions of that section. It is true that when such a case as this is committed by a magistrate's court for sentence to quarter sessions under section 29 of the Magistrates' Courts Act, 1952, the hearing at sessions is treated as a trial on indictment, and that has been stated in this court. But here, if the hearing is treated as a trial on indictment, there was not a sentence in respect of an offence charged in the indictment which was one of imprisonment for twelve months or more. Each sentence was one of less than twelve months, and the consequence is that the case did not come within section 22 as a case requiring the order to be made under that section. This court, therefore, varies the sentence in this case by eliminating from it the order under section 22.

Sentence varied.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY
AND MR. JUSTICE SALMON

1959
Dec. 7

NORMAN SHACTER

Company — Officer — Auditor — Falsifying Books of Account — Publishing Fraudulent Statements — Frauds by Officer of Company in Liquidation — Failure to Keep Proper Books of Account—False Entry by Officer—Larceny Act, 1861 (24 *&* 25 *Vict. c.* 96), *ss.* 83, 84—*Companies Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 159 (1), 328, 330, 331, 455.

An auditor is an officer of a company for the purposes of offences by officers of companies created by section 83 and section 84 of the Larceny Act, 1861, and by the Companies Act, 1948.

Re LONDON AND GENERAL BANK [1895] 2 Ch. 166, *Re* KINGSTON COTTON MILL CO. [1896] 1 Ch. 6, and *Re* WESTERN COUNTIES STEAM BAKERIES AND MILLING CO. [1897] 1 Ch. 617 applied.

Appeal against conviction.

The appellant was convicted at Manchester Assizes on April 30, 1959, on three counts of publishing fraudulent statements and falsifying books, being a public officer of a public company, contrary to sections 83 and 84 of the Larceny Act, 1861, three counts of fraud as an officer of a company which had gone into liquidation, contrary to section 330 of the Companies Act, 1948, and a count relating to defaults as an officer of a company, contrary to section 331 of the Act of 1948, and a count charging the making of a false entry, contrary to section 328 of the Act of 1948. He was sentenced by Thesiger J. to nine months' imprisonment and other concurrent terms.

The appellant was convicted together with one Shalam, who did not appeal. In 1953 he was appointed auditor of a

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public company formed by Shalam at the general annual meeting of the company and the appointment was continued from year to year. Certain figures concerning the stock position of the company were put before a bank with a view to obtaining an overdraft and these figures were found to be false. The judge directed the jury that the appellant was in law an officer of the company for the purpose of all the sections under which he was charged.

Christmas Humphreys, Q.C., and *A. K. Hollings* for the appellant.

Fenton Atkinson, Q.C., and *Philip Kershaw* for the Crown.

The arguments appear fully from the judgment.

THE LORD CHIEF JUSTICE: This appellant was convicted at the Manchester Assizes together with one Shalam, who has not appealed, of publishing fraudulent statements and falsifying books of account contrary to sections 83 and 84 of the Larceny Act, and also of frauds and defaults by officers of a company contrary to sections 330 (*a*) and 331 of the Companies Act, 1948, and of making a false entry contrary to section 328 (1) (*j*). He now appeals by leave of the court.

The short facts, so far as they are necessary for this appeal, are that in 1950 one Maurice Shalam formed a private company to carry on a family business, and the appellant was appointed auditor. He was also appointed auditor of another company formed by Mr. Shalam, the Wellington New Mills Company. He was appointed first on June 22, 1953, at an annual general meeting of the company, and his appointment was continued year by year after that. Apparently the companies, or one of them, got into financial difficulties and ultimately with a view to obtaining an overdraft from a bank, certain figures were put before the bank including the stock position. These charges are made against the appellant in connection with the putting forward of these figures to the bank. He was charged under some eight counts. Two were under section 84 of the Larceny Act, 1861, one under section 83 of that Act, three under section 330 of the Companies Act, 1948, one under section 338 and one under section 331 of that Act. In all those counts the offences laid were offences said to have been committed by " an officer of the company." It is true that under the Larceny Act the words are " by a public officer of a public company," but no one suggests that in this case at any rate the word " public " adds anything.

The learned judge directed the jury in these terms: " There is no dispute that Mr. Maurice Shalam was director of the company and I direct you as a matter of law that if Mr. Shacter was appointed auditor, and was exercising the office of auditor in 1953—and that fact does not seem to be in dispute—then he would be an officer of the company. That is a point of law on which I have to take the responsibility of deciding."

Accordingly, the first and main question which arises in this appeal is whether the appellant was at the material time an officer of the company. The argument for the appellant can be summarised as follows: An auditor, it is said, prima facie is not an officer. His duty is to safeguard the shareholders and not to help the directors, and he is not concerned with the day-to-day running or internal management of the company. It would be surprising, so runs the argument, to find him treated by the legislation as an officer, and great stress is laid on the definition clause in the Companies Act, 1948, s. 455, where an officer is defined in these terms: " ' officer,' in relation to a body corporate, includes a director, manager or secretary." Observe, it is said, that no reference is made to " auditor." That section, however, is a section of inclusive definition, and it is necessary to look more closely at the sections of the Act.

The first and perhaps most relevant section is section 159, subsection (1) of which provides: " Every company shall at each annual general meeting appoint an auditor or auditors to hold office from the conclusion of that, until the conclusion of the next, annual general meeting "; and in subsections (5) and (6) of that section reference is again made to auditors appointed to hold office and to the office of auditor. Pausing there, it can well be asked what office an auditor is being appointed to unless it is an office in the company, and what officer he becomes unless it be an officer of the company?

Turning to section 161, it is provided, so far as it is relevant, by subsection (2): "None of the following persons shall be qualified for appointment as auditor of a company—(*a*) an officer or servant of the company," and by the last sentence: "References in this subsection to an officer or servant shall be construed as not including references to an auditor." It follows from that, first, that an auditor becomes, or at any rate may become, on his appointment an officer of the company, otherwise the last sentence I have referred to is unnecessary. Secondly, if he does become an officer of the company, it can only be by reason of being an auditor, for, if he became an officer for any other reason, he would under the subsection be disqualified. Further, in various sections of the Act, in particular section 167 (5), section 205 (1) and section 448 (1) reference is made to an auditor "whether an officer of the company or not." Those passages again at any rate show that an auditor may be an officer of the company, and this can, as I have already said, only be by reason of his appointment as auditor. Clearly, therefore, the Act contemplates that an auditor may at any rate be an officer by reason of his appointment under section 159.

So far as the authorities are concerned, these are all under the misfeasance section in earlier Acts dealing with civil liability, but they clearly show this, that an auditor appointed to fill an office is an officer, whereas an auditor appointed *ad hoc* for a limited purpose is not. The first case to which we were referred was *Re* LONDON AND GENERAL BANK [1895] 2 Ch. 166. In that case an auditor had been appointed by a banking company pursuant to section 7 of the Companies Act, 1879. That section provided, so far as is relevant, as follows by subsection (1): "Once at the least in every year the account of every banking company . . . shall be examined by an auditor

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or auditors, who shall be elected annually by the company in general meeting." Then, by subsection (2): "A director or officer of the company shall not be capable of being elected auditor of such company." The court, consisting of Lindley, Lopes and Kay L.JJ., were of the opinion that the auditor was an officer of the company within the relevant misfeasance section. It is true that in that case the articles of the bank in fact defined auditors and the secretary as meaning those respective "officers" from time to time of the company. In other words, the articles, unlike the present case, were treating auditors as officers, but if one examines the judgments it is quite clear that in all three cases they are based upon the appointment, although the opinions expressed were confirmed or fortified by a reference to the articles. Again, in *Re* KINGSTON COTTON MILL COMPANY [1896] 1 Ch. 6 the court, again the Court of Appeal, followed the LONDON AND GENERAL BANK case (*supra*), and they did that despite the fact that there was nothing in the articles in that case corresponding to the articles in the LONDON AND GENERAL BANK case (*supra*). Finally, in *Re* WESTERN COUNTIES STEAM BAKERIES AND MILLING COMPANY [1897] 1 Ch. 617 the same distinction was drawn, namely, a distinction between somebody appointed to an office who would be an officer of the company, and an auditor who was merely appointed *ad hoc* for some limited purpose.

It is true, as I have said, that those three cases were all dealing with questions of civil liability, but this court sees no reason to draw any distinction in a criminal case. Section 333, which is the present misfeasance section, must be taken to have been passed, and passed in virtually the same words as in earlier Acts, with full knowledge of the decisions in those cases to which I have referred. It is a section which follows closely on the sections creating criminal offences, and this court sees no reason to give any different interpretation to the word "officer" in the penal sections than in section 333.

Mr. Humphreys urged that under the present legislation there is no power to appoint an auditor except under subsection (1) of section 159 of the Act. If that be so, the words "whether an officer of the company or not," which appear in the various sections to which I have referred, are meaningless, but, without deciding the matter, it seems to this court that the scheme of the present legislation is really to perpetuate the distinctions drawn in the cases referred to, and that it would still be possible under this legislation for the directors as opposed to the shareholders in annual general meeting to appoint, for instance, somebody as auditor for a limited purpose, it may be for a private audit. Looked at in that way, it becomes clear at once why no reference to "auditor" is specifically put in the definition section. This court has come to the clear opinion that the appellant in this case was at the relevant time an officer of the company, and that the learned judge's direction to the jury was correct in law.

That, as I have said, is the main point in this appeal, but Mr. Humphreys has urged three further matters on behalf of this appellant. His first point is this, that although there was ample direction by the learned judge to the jury on the question whether the appellant knew that the figures he was putting forward were false, there was nowhere any sufficient direction on the very first point which must arise, namely, whether the figures were false at all. He points out that the judge made no reference to the evidence of something like five witnesses called by the defence, all of whom, after the event and working backwards, apparently said that the figures might well be correct. However, it appears that on no less than five occasions in the summing-up did the learned judge specifically tell the jury that the first question was whether the figures were false at all and that on that they must be satisfied. It is unnecessary to refer to all the passages. It is perhaps enough to refer to one where he said this: "Now, before you reach conclusions on those two questions put on that piece of paper you must pay regard to what Mr. Glidewell has said, that the figures are not false at all. The £12,131 0s. 0d. may, after all, be correct, and the figure of £19,383 0s. 0d. may, after all, be correct, and I am sure you have followed all the reasons for that very carefully." That is but one of five passages, and it seems to this court that in a long case of this nature where all the facts were before a Manchester jury, and where the matter had been dealt with at length in argument, it was unnecessary for the learned judge to go through all the evidence and all the arguments as to the falsity of the figures.

Secondly, Mr. Humphreys draws attention to a passage in the summing-up dealing with the character of the appellant. The learned judge said this: "Before you come to answer the two questions on the paper, remember that each of the two accused men, one practising as an accountant and the other a business man, are of good character. While that may mean that it is unlikely that they would be dishonest, there are, of course, cases of this sort where people of good character have been dishonest at a time when they have been trying to save their business, hoping perhaps in the end that the business would be saved and that nobody would lose." It is also said by Mr. Humphreys, and Mr. Atkinson for the prosecution agrees, that something was there said which does not appear on the shorthand note to the effect that there was Lord Kylsant, and no one had a better character than he had, and yet he went to prison. The court does not understand how a passage of that sort came to be omitted from the shorthand note, but though it was a remark which might well have been left unsaid, it cannot possibly in the view of the court vitiate the direction which otherwise was unobjectionable.

Finally, the last ground is that the learned judge failed in summing up, if I understand the point aright, to correct something which the prosecution had urged in argument. Apparently the prosecution had said or suggested that it might well be that the appellant stood to get something out of it, that perhaps Mr. Shalam had promised him some reward. It is only right to say that there was not a shred of evidence to that effect; but it is quite clear that if that was said—and I assume it was—it was said merely by way of comment. In the opinion of this court, there was no necessity for the learned judge in this long case and this long summing-up to draw attention to that matter and to have pointed out that in fact there was no evidence to support it. Accordingly, this court, having considered the matter with some care, has come to the conclusion that there is nothing in the points raised, and therefore this appeal must be dismissed.

Appeal dismissed.

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[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY
AND MR. JUSTICE PEARSON

Re PHILPOT

1959
Dec. 11

Sentence—Preventive Detention or Corrective Training—Report of Prison Commissioners — Requirement of Statute that Report " shall be given " to Prisoner or his Representative—Whether Directed to Procedure or to Making of Condition Precedent to Sentence—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 21 (5).

By section 21 (5) of the Criminal Justice Act, 1948: " A copy of any report or representations in writing made to the court by the Prison Commissioners for the purposes of the last foregoing subsection shall be given by the court to the offender or his counsel or solicitor."

The words " shall be given " in the above subsection are merely directed to the procedure which ought to be followed and are not imperative so as to make it a condition precedent to a sentence of preventive detention or corrective training that the copy should be given.

DICKSON, 34 Cr.App.R. 9; [1950] 1 K.B. 394 explained.

Motion for habeas corpus.

The applicant, John Philpot, was sentenced on July 10, 1953, at Worcestershire Quarter Sessions, to nine years' preventive detention for attempted shopbreaking. He obtained leave

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Re PHILPOT

Parker L.C.J., Hilbery J., Pearson J.

to apply for a writ of habeas corpus on the ground that his detention in prison was illegal because he had not, before being sentenced, been handed a copy of the Prison Commissioners' report nor had a copy been handed to his legal representative.

Neil Butter for the applicant.
J. R. Cumming-Bruce for the Crown.

THE LORD CHIEF JUSTICE: In these proceedings Mr. Butter moves for a writ of habeas corpus on behalf of one Joseph Philpot now undergoing imprisonment in Her Majesty's Prison at Parkhurst. The applicant was sentenced as long ago as July 10, 1953, to a term of preventive detention following on his conviction with two other persons of attempted shopbreaking. His complaint, which he has been voicing from time to time since 1954, is that he was not shown a copy of the Prison Commissioners' report.

Let me say at once that there are many difficulties in his way in this application. For one thing, it is almost impossible for this court to say with any certainty today whether on a certain day in 1953 a copy of the Prison Commissioners' report was or was not handed to him or to his legal representative. Secondly, it is a well-known principle that this court does not in the ordinary way grant a writ of habeas corpus to persons who are in execution, that is to say, persons who are serving sentences passed by courts of competent jurisdiction. (See in particular the judgment of the Divisional Court in *Re* FEATHERSTONE (1953) 37 Cr.App.R. 146.) For my part, I will assume for the purposes of these proceedings that no report of the Prison Commissioners was ever served on or given to the applicant or his legal representative, and I will also assume that contrary to what my impression is at the moment, this court has jurisdiction to entertain the application. I should add that in this case it appears from the affidavit evidence that in fact a report was made and, as I have said, I am assuming for the purpose of this application that a copy was not given to the offender or his counsel or solicitor.

Section 21 (5) of the Criminal Justice Act, 1948, provides as follows: " A copy of any report or representations in writing made to the court by the Prison Commissioners for the purposes of the last foregoing subsection shall be given by the court to the offender or his counsel or solicitor."

The sole question, and the short question, is whether the words " shall be given " in subsection (5) are merely directed to the procedure which should be followed or whether they are imperative and are making it a condition precedent to a sentence of preventive detention that the copy should be given. For myself, I am quite satisfied that those words are directed only to the procedure to be followed. They are, as it seems to me, in direct contrast to the words used in section 23, which provides for a notice being served of the intention to prove previous convictions. There the words used are: " No account shall be taken of any previous conviction or sentence unless notice has been given to the offender," and so on. In other words, the subsection is making it abundantly clear that the qualifying convictions which are necessary before a sentence of preventive detention is given cannot be given in evidence at all unless a condition precedent is complied with, namely, the serving of the requisite notice.

Reliance, however, was put on the decision of the Court of Criminal Appeal in DICKSON, 34 Cr.App.R. 9; [1950] 1 K.B. 394. In that case the prisoner was sentenced to ten years' preventive detention, but no evidence had been given that the notice had been served upon him. It had in fact been served on him and his signature had been obtained to it, but at the trial no evidence was given that it had been served, nor was his signature proved, nor was he asked whether he admitted the convictions set out in it. The decision in DICKSON (*supra*) relates, as I read it, solely to the question of the section 23 notice. It is true that in the statement of the facts in [1950] 1 K.B. at p. 395 it is said that the appeal was on the question of the alleged failure to carry out the requirements of section 21, that is, the handing of the Prison Commissioners' report. It is quite clear, however, from reading the arguments and the judgment that that is a mistake, and the appeal was on the sole ground of the alleged failure at the trial to carry out the requirements of section 23. However, there is no doubt that in giving the judgment of the court Lord Goddard did use words which, taken out of their context, would appear to convey that section 21 (5) was imperative and was something which had to be done before a prisoner qualified for and could be sentenced to preventive detention. It is only perhaps necessary to refer to one passage (34 Cr.App.R. at p. 13; [1950] 1 K.B. at p. 397), where he says: " The court thinks that this is a good opportunity for stating what is the proper procedure to be adopted by all courts concerning proof of the matters necessary to qualify a prisoner to receive a sentence of corrective training or preventive detention." He then goes on to say that that procedure should include the handing to the prisoner of the report of the Prison Commissioners. The truth of the matter, as I see it, is that this is merely a decision in regard to section 23, but that an opportunity was there taken by Lord Goddard to say what was the proper procedure as a matter of routine in regard to copies of the Prison Commissioners' report. For my part, I am quite satisfied that he was not treating or intending to treat section 21 (5) as setting out a condition precedent to a sentence of preventive detention.

I should add that the same view was taken by Glyn-Jones J. in an unreported case decided on July 24, 1959, where, in regard to Lord Goddard's judgment, he said: " By those words "—that is, after quoting the passage in the judgment—" Lord Goddard was not laying down conditions precedent to jurisdiction, he was merely giving directions as to a businesslike way of complying with the proper procedure laid down by the statute." For my part, I entirely agree. That, however, does not mean that the provisions of the subsection should not be complied with. Indeed, in Dickson's case (*supra*), and again more recently in the Court of Criminal Appeal in Wintle (1959) 43 Cr.App.R. 191, this court has been anxiously concerned to see that a procedure is adopted whereby the handling of the Prison Commissioners' report or, in the case of Borstal, the Borstal Commissioners' report, is recorded in some way on the shorthand note. The point is constantly being taken by prisoners that a copy was never given to them or to their legal representatives, and, unless there is something recorded on the transcript, it is almost impossible for the court to say whether it was done or not. But neither DICKSON's case (*supra*) nor WINTLE's case (*supra*) are in any way authorities for saying that section 21 (5) is a condition precedent to a sentence of preventive detention.

The matter is, I think, made even clearer when one realises that it is not in every case that there has to be a Prison Commissioners' report. Subsection (4) of section 21 merely says that, before sentencing any offender to corrective training or preventive detention, the court shall consider any report or representations which may be made to the court by or on behalf of the Prison Commissioners. In a case where a report of that sort is not of itself a condition precedent to a sentence of preventive detention, it seems to me all the less reason for saying that the handing of a copy to the prisoner is itself a condition precedent. Accordingly, in my judgment this application fails and should be dismissed.

HILBERY J.: I agree. I only add a word or two because I was a member of the court in the case of DICKSON (*supra*) when Lord Goddard, giving the judgment of the court, referred to the handing of a copy of the Prison Commissioners' report and when it should take place. In that case if the argument is looked at, it is perfectly clear, and it is in accordance with my recollection, that the whole case depended upon a contention that there was no evidence that the notice of an intention to prove previous convictions was served on the appellant and that the provisions of section 23 (1) had not been observed. It was urged that in the absence of an admission of those previous convictions by the accused, the determination of the question whether those previous convictions had been suffered by the accused would have to be left to a jury. If the argument is looked at, it will be seen that for the Crown Mr. Fay admitted that there was certainly no evidence that the notice had been served on the appellant. The whole case turned on whether the service of the notice of intention to prove previous convictions required by section 23 was a condition precedent to a sentence of preventive detention or corrective training being passed. It is perfectly true that the court gave a direction with regard to the procedure which should be followed, but I think it is not unimportant to observe that, if Lord Goddard's language is looked at carefully, it will be seen that in the first part of the direction he deals with matters that require proof. He said (34 Cr.App.R. at p. 13; [1950] 1 K.B. at p. 397): " The court thinks that this is a good opportunity for stating what is the proper procedure to be adopted by all courts, concerning proof of the matters necessary to qualify a prisoner to receive a sentence of corrective training or preventive detention." He is dealing with proof of matters necessary to qualify and the procedure to be adopted concerning proof of those matters, and then he says: " After a plea or verdict of guilty has been returned a police officer should be called by counsel for the prosecution to prove that he served a notice on the prisoner, as provided by section 23 (1), three days before the trial. When that has been proved, the clerk of assize or the clerk of the peace, as the case may be, should then put the contents of that notice to the prisoner and obtain his admission or his denial of the convictions in open court—generally speaking, it will be an admission—that he has had the previous convictions." There he is dealing with the matters which must be proved. Then he gave a direction, and I think, speaking as one of the court, clearly intending, as I for my part certainly intended, that it should be read and understood as a direction that a copy of the Prison Commissioners' report should be handed to the prisoner. Stress is laid on the word " must," but I think it was never meant to imply any more than that, as a matter of procedure and no more, that course is to be adopted. I think that explanation, if explanation is needed, is all I need add to what has fallen from my Lord, and I only ventured to add it as I was a member of the court in DICKSON'S case (*supra*).

It has been called to our attention that there was before Glyn-Jones J. an unreported case in which it was clearly indicated that that was the right interpretation of the judgment in DICKSON (*supra*), and what Lord Goddard intended to convey. I agree that this application fails, but I desire to emphasise that we are assuming for the purpose of giving this judgment that the application could be made though the prisoner is in execution.

PEARSON J.: I agree and have nothing to add.

Application refused.

Solicitors: Official Solicitor for the applicant; Treasury Solicitor for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE PEARSON

JOHN SMITH

1959
Dec. 14

Corruption—Public Body—Corruptly Offering Gift to Member of Body—Meaning of "corruptly"—No Necessity that Offeror should Intend to see Transaction Through—Motive of Offeror Irrelevant—Public Bodies Corrupt Practices Act, 1889 (52 & 53 *Vict. c.* 69), s. 1 (2).

Section 1 (2) of the Public Bodies Corrupt Practices Act, 1889, provides: "Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage . . . as an inducement to or reward for . . . any member, officer, or servant of any public body doing . . . anything in respect of

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any matter or transaction . . . in which such public body as aforesaid is concerned, shall be guilty of a misdemeanor."

"Corruptly" in the above subsection means that there should be a deliberate offering of cash or something similar with the intention that it should operate on the mind of the offeree to make him enter into a corrupt bargain. It is not necessary that the offeror should intend to see the transaction through and the motive of the offeror is irrelevant.

Appeal against conviction.

The appellant, together with a man named Lockyer, who did not appeal, was convicted at Leeds Assizes on July 27, 1959, of corruption, contrary to section 1 (2) of the Public Bodies Corruption Act, 1889, and was sentenced by Paull J. to twelve months' imprisonment.

The appellant's wife owned a plot of land next to their house, which was suitable for a petrol filling station. The appellant was minded to persuade the Castleford Borough Council to sell for this purpose a part of their land adjoining the plot owned by his wife. On January 27, 1959, Lockyer (who was convicted with the appellant of the same offence) called at the appellant's house and the appellant drew up an IOU for £500. There was no doubt that when Lockyer left the house the appellant knew that Lockyer would offer it as a bribe to some councillor. Lockyer went to the Town Hall and had an interview with the mayor at which he offered him the lion's share. The mayor did not agree to any such thing.

Just after the time of the offer by Lockyer, the appellant wrote a number of letters to the Press and others inviting them to investigate the matter or to witness the exposure of corruption about to be made. It was his case that although he intended Lockyer to take the IOU to the mayor and offer it as a bribe, he did not intend to take the matter any farther; that he wanted the mayor to accept the bribe and he would then have exposed him, and that he wanted no favours.

The judge directed the jury that, as a matter of law, the word "corruptly" in section 1 (2) meant an intention to corrupt and that the motive of the appellant, however praiseworthy, was irrelevant.

P. Stanley Price, Q.C. (*H. Savill* with him), for the appellant: The judge's definition of "corruptly" is not open to objection, provided that an intention to corrupt means an intention that the corrupt transaction should go through for the benefit of the person who makes the offer. The judge, however, in effect directed the jury that the intention of the appellant to offer the IOU to the mayor in order to get the mayor's agreement to the transaction in principle was sufficient to prove corruption, whether the appellant intended that the transaction should go through or not. The jury were not allowed to consider what the appellant might have done in the long run. That, it is submitted, is not correct; if it were, the word "corruptly" would add nothing to the words already contained in the subsection.

W. A. B. Goss for the Crown. The judge correctly stated the law to the jury. It is unnecessary to render a bargain a corrupt one for the purposes of section 1 (2) of the Act of 1889 that there should be an intention that the transaction should be completed and, as the judge pointed out, the motive of the person who makes the corrupt offer is quite immaterial.

THE LORD CHIEF JUSTICE: This appellant, together with a man called Lockyer, was convicted at Leeds Assizes of corruption, contrary to section 1 (2) of the Public Bodies Corrupt Practices Act, 1889. Both of them were sentenced to twelve months' imprisonment. The present appeal is by John Smith only against that conviction.

It is a curious case, and some of the facts need to be stated. The appellant's wife apparently had a plot of land adjoining their house which it was thought would be suitable together with other land, if it could be obtained, as a petrol filling station. The appellant was minded to persuade the Castleford Borough Council to let him have part of their land adjoining for that purpose. There is no doubt that on January 27, 1959, when Lockyer, who was an insurance agent, came to collect a premium, the appellant drew up an IOU for £500 and handed it to Lockyer, and there is no doubt that when Lockyer left the house the appellant knew that Lockyer would offer it as a bribe to some councillor. That is what he said. Lockyer in fact went to the Town Hall and obtained an interview with the mayor and offered him what is said to be the lion's share of that £500. The mayor did not agree to any such thing, and eventually the appellant and Lockyer were charged.

That is really only half the story, because this appellant, on any view, is an extraordinary man. For years and years he has been convinced that there is corruption among the police. Then his mind turned to corruption amongst the magistrates, and at this time his mind was on corruption among members of the Castleford Borough Council. He wrote a number of letters just after the time when this offer was made by Lockyer inviting members of the Press, the police, and goodness knows whom, to come down, because he was going to expose some fraud. His case was that, although he intended Lockyer when he left the house to take the IOU to the mayor or some councillor and to offer it or part of it as a bribe, he never intended to carry the matter any farther. In other words, his intention was to get the mayor or other councillor to accept in principle the idea that he, the appellant, would pay money in exchange for favours and that then he would possibly hand over marked notes or, at any rate, be in a position to expose the mayor or councillor; and that he never intended the matter to go through so that he would obtain in fact any favour from the council. That was his case.

When the learned judge came to sum up, that case, in effect, was withdrawn from the jury. It was never left to the jury to consider what the appellant might have done in the long run. The learned judge ruled that, whatever his motive, if he did intend to get the mayor's agreement to accept money for a favour to be shown, an offence had been committed.

The subsection in question reads as follows: "Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to or reward for or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a misdemeanor."

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The learned judge, after reading that subsection to the jury and pointing out that the object of the subsection was to protect people in public life from having the temptation of being offered gifts to do something in carrying out their public duties, went on in these terms: "The next thing to note is the word 'corruptly.' You will notice the words 'corruptly give or offer.' What does the word 'corruptly' mean? This is law and I am telling you this as law: 'corruptly' there means with the intention to corrupt. In other words, if I offer you a reward in order that you should do something which may help me, I am doing it corruptly, if I am offering and hoping that the offer will induce you to act in the way in which I want you to act. Motive does not matter, it may be that I do it because I am anxious to help myself, it may be I am anxious to help a widow, who, perhaps, is starving and whom I think I can help by getting a public official, a person in public life, to do anything which would help her. In one sense I suppose it could be said that any such motive sprang from the best possible motive, the endeavour to help. It does not matter. When I offer you that gift, I do it with the intention that you should so receive a reward for doing something in connection with your public duties. This is the meaning of the word 'corrupt,' intent to corrupt, the intention to corrupt the person to whom the offer is made."

It is that direction which is challenged on this appeal and is said to be wrong. It is, perhaps, a matter to some extent of words. I do not think that Mr. Stanley Price, who has argued this matter with great care for the appellant, would object to that definition of "intent to corrupt" if by that is meant to corrupt in the full sense, namely, an intention not merely, to take the present case, that the mayor would accept the offer in principle, but that money would thereafter be paid and accepted and a favour be received, in other words if the intention was throughout that the transaction should go through to the benefit of the appellant. Read in that sense, Mr. Stanley Price would not object to the definition, but in the sense in which it was used by the learned judge it is quite clear that he was saying that the undoubted intention of this appellant to offer the IOU in order to get the mayor's agreement in principle to the transaction was in itself an intention to corrupt which was sufficient to support the conviction.

It should be observed that by the first subsection of section 1 it is provided, inter alia: "Every person who shall by himself or by or in conjunction with any other person . . . receive, or agree to receive . . . any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of a misdemeanor."

In the present case, as I have said, the admitted intention was that the mayor would agree to receive money and, accordingly, the intention undoubtedly was that the mayor should agree to something which itself constituted an offence and, indeed, constituted an offence of corruption within the very same section. The sole question, for the purposes of this case, as it seems to the court, is whether the word "corruptly" in its context means deliberately offering money, or whatever it may be, with the intention that it should operate on the mind of the person to whom it is made so as to make him enter into what I may call a corrupt bargain, or whether it means that the intention must be that the transaction should go right through and that the offeror should obtain the favour for which he sought. It seems to this court that the word "corruptly" here used (and it is a word which appears throughout the Act and other Acts dealing with corruption) is used in the former sense, namely, that it denotes that the person making the offer does so deliberately and with the intention that the person to whom it is addressed should enter into a corrupt bargain.

The real argument to the contrary, and it is an argument which has been pressed upon this court, quite rightly, is that, if that is all that "corruptly" means, then it really adds nothing to the words that are already there in the subsection. That, to a large extent, may be true, but it seems to this court that the word "corruptly" in the sense to which I have referred may well be necessary in that subsection in the case of rewards or fees given for services or favours already rendered. The matter has arisen in dealing with election petitions under section 2 of the Corrupt Practices Prevention Act, 1854 (rep.). It is unnecessary to read the section in detail but, broadly speaking, it provided that every person who should give or offer money to a person to vote in a particular way would be guilty of an offence; secondly, that anybody who "corruptly" did such an act on account of a voter having voted in a particular way should also be guilty of an offence. In regard to the offer to vote in a particular way, the word "corruptly" is not used, but in so far as it is dealing with the past, the reward for voting in a particular way, the word "corruptly" does appear.

The matter came before the House of Lords in COOPER *v.* SLADE (1857) 6 H.L.Cas. 746. Three questions were referred by the Lord Chancellor to the judges. There was a division of opinion but, in the opinion of the majority, the word "corruptly" where used in connection with a reward to somebody who had voted was held in effect to add nothing. Willes J., who was one of the majority, said this (at p. 773): "In answer to the third question, I am of opinion that there was evidence that the defendant corruptly paid money to Carter on account of his having voted at the election. I think the word 'corruptly' in this statute means not 'dishonestly,' but in purposely doing an act which the law forbids as tending to corrupt voters, whether it be to give a pecuniary inducement to vote, or a reward for having voted in any

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particular manner. Both the giver and receiver in such a case may be said to act 'corruptly.' The word 'corruptly' seems to be used as a designation of the act of rewarding a man for having voted in a particular way as being corrupt, rather than as part of the definition of the offence."

The minority view, which was expressed by, amongst others, Coleridge J., as he then was, was to the effect that "corruptly" did add something. At p. 785 he said: "As a general rule, no doubt, the party's knowledge of the law is immaterial, or perhaps is to be conclusively presumed; but here the statute expressly makes the operating motive in the mind of the party material, and it adds that that motive must be corrupt; which is as much as to say, that it may operate honestly and without intent to interfere with the purity of election." Although the view of the majority was that the word "corruptly" added nothing, the words in the present case are different and there is certainly force in the view that the word "corruptly" may be necessary in dealing with the case of a reward for services rendered. Accordingly, it is wrong to say that the word "corruptly" cannot be given some meaning additional to what is provided by the words of the section without it.

The view which we have formed is, we think, confirmed by the passage I have already quoted from Willes J. in COOPER *v.* SLADE at p. 773. I will read it again: "I think the word 'corruptly' in this statute means not 'dishonestly,' but in purposely doing an act which the law forbids as tending to corrupt voters." It seems to this court that those words apply in the present case. The mischief aimed at by the Act, as the learned judge told the jury, was to prevent public officers or public servants being put in a position where they are subject to temptation. Accordingly, to adopt the words of Willes J., the appellant even on his own case was here purposely doing an act which the law forbids as tending to corrupt. It seems to this court, therefore, that on the facts of this case the direction given by the learned judge was perfectly correct and that there are no grounds for quashing this conviction. Accordingly, the appeal is dismissed.

Appeal dismissed.

BEFORE

MR. JUSTICE CASSELS, MR. JUSTICE DONOVAN AND MR. JUSTICE ASHWORTH

WILLIAM JAMES McKENNA
CHARLES ALEXANDER McKENNA
ARTHUR WILLIAM BUSBY

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Jury—Time Limit Set for Arriving at Verdict—Threat by Judge—Irregularity in Trial—Refusal to Apply Proviso—No Venire de Novo—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (1).

Accessory after the Fact — Direct Aid to Another Accessory — Principal Felon thereby Aided Indirectly — Accessories and Abettors Act, 1861 (24 *&* 25 *Vict. c.* 94), *s.* 3.

After a jury had retired soon after midday to consider their verdict for two hours, they returned into court and asked certain questions, which the judge answered. After they had retired for a further quarter of an hour they were sent for by the judge at 2.38 p.m., who then said: " I have disorganised my travel arrangements out of consideration for you pretty considerably already. I am not going to disorganise them any further. In ten minutes I shall leave this building and if by that time you have not arrived at a conclusion in this case you will have to be kept all night and we will resume this matter at quarter to twelve tomorrow. . . ." The jury thereupon retired again, coming back into court six minutes later with verdicts of Guilty in respect of all the defendants.

Held, that it was a fundamental principle that a jury should deliberate in complete freedom, uninfluenced by any promise and unintimidated by any threat, and should be free to take such time to consider their verdict as they felt they needed, subject always to the right of the judge to discharge them if protracted consideration still produced disagreement; that the words by the judge in the present case amounted to a threat which was insupportable; and that, therefore, despite the strength of the case for the prosecution, the court would not apply the proviso to section 4 (1) of the Criminal Appeal Act, but would quash the convictions. A *venire de novo* could not be ordered in such circumstances, because the trial was not in the true sense of the word a nullity.

A person charged as accessory after the fact to felony may be convicted as such, though the help given by him was intended directly to assist another accessory after the fact and only indirectly to assist the felon.

Appeals against conviction.

The appellants were convicted at Nottinghamshire Assizes on November 25, 1959, the appellant Busby of larceny and taking and driving away a Dennis motor-van without lawful authority, and the appellants William James McKenna and Charles Alexander McKenna of being accessory after the fact to larceny. They were sentenced by Stable J., Busby to concurrent terms of three years' and six months' imprisonment, William James McKenna to be placed on probation for three years, and Charles Alexander McKenna to two years' imprisonment, to run concurrently with a sentence which he was already serving.

The judge commenced his summing-up at 10.30 a.m. on the third day of the trial. Arrangements had been made whereby the court would not be sitting on that afternoon, and that fact had been announced on the first day of the trial. At 12.5 p.m. the judge, having almost concluded his summing-up, said to the jury: "Under the rules that govern our procedure once a summing-up is finished and the jury retire they cannot separate until the verdict has been arrived at. If in the middle of the summing-up a break is requested the jury can go before the conclusion and come back and hear the conclusion of the summing-up the next day or after the adjournment. The position is this, that I am very much afraid that I have this engagement and I cannot escape it. I have to get up to

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London by the 1.35 train, which means I have to leave here about ten past one. If you feel you cannot arrive at a verdict in this case before then, I can break off my summing-up at this stage. There won't be very much to add, I can assure you, and you can come back here tomorrow morning at 11.45, by which time I shall have returned from London, and then I can conclude the summing-up and you can retire and arrive at your verdict. What I want to guard against is one o'clock coming and you saying 'we still have not arrived at our verdict,' in which case I would have to throw this engagement over and it would be very inconvenient and would keep you locked up overnight."

The jury asked permission to discuss that matter and after ten minutes' retirement said that they would need more than three-quarters of an hour. The judge then said: " I will catch the later train," and added a few sentences to his summing-up. The jury retired at 12.20 p.m. to consider their verdict. At 2.20 p.m. they returned and asked the two following questions: first, " Is it possible for William James McKenna to be an accessory after the fact by wittingly helping an accessory after the fact? " to which the judge replied " Yes," and secondly, " If the jury are convinced by the evidence that Busby was driving the Dennis in the county of Cambridge unladen, in what way can the indictment be altered? ", to which the judge replied " The answer is that it cannot be altered at all." They retired again at 2.23 p.m. and were called back by the judge at 2.38 p.m. The judge then said: " I have disorganised my travel arrangements out of consideration for you pretty considerably already. I am not going to disorganise them any further. In ten minutes I shall leave this building and if, by that time, you have not arrived at a conclusion in this case you will have to be kept all night and we will resume this matter at quarter to twelve tomorrow. I do not know, and I am not entitled to ask—and I shall not ask—why in a case which does not involve any study of figures or documents you should require all this time to talk about the matter. May I suggest to you that you go back to your room, that you use your common sense, and do not worry yourselves with legal quibbles? That is what you are brought here for: to use your common sense, bring a bit in from outside. There it is, members of the jury." The jury then retired again and six minutes later brought in their verdict finding all the appellants guilty.

J. J. Deave for the appellants William James McKenna and Charles Alexander McKenna. The substantial ground of appeal on the part of all three appellants relates to the first three sentences of the last observations of the judge. These constituted a threat to the jury that, if they did not return a verdict within ten minutes, they would be imprisoned for the night. A timorous or hesitant juror might well have been shocked into returning promptly a verdict which he did not really wish to return. It is a basic principle of the common law that a jury should return their verdict freely and should not be under any threat of fine or imprisonment. The words used by the judge in the present case did constitute a threat. There is little modern authority on the matter. In HARTLEIGH (1910) 1 Cr.App.R. 17 the jury were informed that they would be locked up for two hours. The court there held that the procedure had been regular, apparently on the ground that there was no suggestion that the jury had been coerced into agreeing, but the facts of that case appear to have been very different from those of the present case. Here the jury had already been out for two hours and were obviously finding difficulties with regard to the case of one or more of the appellants, and there is a vast difference between a jury being told that they would be locked up for two hours and being told that they would be imprisoned for something like twenty hours. [DONOVAN J.: It is misleading to use the words "locked up." The doors of the retiring room of the jury are always locked.] [ASHWORTH J.: Would the mere fact that the judge told the jury that they would have to stay all night be objectionable?] Possibly not, in certain circumstances.

A further point is urged on behalf of the appellant William James McKenna. He was charged with being accessory after the fact only to Busby and certain other alleged thieves who were not in custody. There was no evidence that he had assisted Busby, either directly or indirectly. The fair inference from the jury's first question to the judge is that they were considering only whether this appellant had assisted his brother. If that was all he had done, he could not be convicted as an accessory.

[CASSELS J.: Suppose we are with you on your first point with regard to the judge's observations, what do you suggest should be done?] It is submitted that the appeals should be allowed and the convictions quashed. [ASHWORTH J.: What about the proviso to section 4 (1) of the Criminal Appeal Act, 1907?] The words used by the judge constituted such a threat as to go to the root of the whole trial, and in those cases it would not be right to apply the proviso, on the principle that justice must not only be done, but be seen to be done.

P. G. Hughes for the appellant Busby. It is desired to adopt on behalf of this appellant the argument already addressed to the court on the main point. To put the matter at its lowest, there must be a strong suspicion that the jury acted as they did because of pressure put upon them by the judge. The jury had been unable to make up their minds after having retired for two and a quarter hours, and the fact that they did so following on the observations of the judge which are complained of within just over five minutes raises an almost irresistible inference that their minds were then influenced not so much by the weight of the evidence as by the fear of the consequences to themselves. This case is in no way analogous to cases in the past where juries have retired very late in the evening to consider their verdict and have had to be locked up all night. Moreover, there were two women on the jury.

T. R. Fitzwalter Butler (*D. M. Cowley* with him) for the Crown. There appear to be three stages in the consideration of the alleged irregularity: first, whether the words used by the judge did amount to an irregularity affecting the trial of any of the appellants; secondly, if it did, whether it affected the trial of one only or more than one; and thirdly, if there was an irregularity affecting the trial, what course the court should now adopt. With regard to the first point, there appears to be no authority other than that of HARTLEIGH (*supra*), and the Crown do not seek to place much reliance on that case, because the case is scantily reported and it is difficult to know what exactly happened. In fairness, however, to Stable J. the court should consider the whole of the proceedings and not merely the passage of which complaint is made. Before there was any kind of suggested threat or pressure the judge had clearly explained to the jury the procedural difficulties which might arise if they failed to agree. It is perhaps surprising that when, after the short retirement, the foreman said that they would need more than three-quarters of an hour, he did not add a request to the judge to break off his summing-up and continue on the next day. [DONOVAN J.: The foreman of a jury is sometimes nervous. The responsibility cannot be put on the jury. It is surprising that the judge, faced with the danger which he wished to avoid, went on.] Yes, that is certainly so. It can, however, be said that when the words complained of were spoken the jury were not taken by surprise and any threatening effect the words may have had would be lessened for that reason. The judge may have been a little impetuous, and it is not sought to justify the words which he used which, it must be conceded, were unfortunate, but if there was any threat or pressure, that does not necessarily mean that the effect was adverse to the accused. It was just as likely, and perhaps more likely, to cause the jury to return a speedy verdict of acquittal, or to state that they were unable to agree. So far as Charles McKenna and Busby are concerned, the evidence was so overwhelming that no reasonable jury could have come to any conclusion other than that they were guilty and, if irregularity in the trial is established, the court is asked to consider the propriety of applying the proviso to section 4 (1) of the Criminal Appeal Act, 1907, in their cases.

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So far as the case of William McKenna is concerned, the submission cannot be made with the same force, because it would appear that the jury were finding difficulty when they considered his case. There was a very strong case against him also, but not quite so strong as against the other appellants, and the court may consider that it was of sufficient strength to warrant the propriety of applying the proviso being considered in his case also. Finally, if it is held that there has been an irregularity affecting the trial of all three appellants, it is submitted that the court would have the power of ordering a *venire de novo*. Ever since CRANE *v.* D. P. P., 15 Cr.App.R. 183; [1921] 2 A.C. 199 it has been established that the court has this power when there has been a mistrial, though it is a matter for the discretion of the court whether to exercise the power or not. It must be conceded that there are dicta in NEAL, 33 Cr.App.R. 189; [1949] 2 K.B. 590 which suggest that the court has not this power where the trial has been regular up to the conclusion of the summing-up, but it is submitted that that case can be distinguished from the present case. There the verdict of the jury was returned perfectly freely and without any kind of pressure, and the conviction was quashed because of the procedural irregularity that the jury were allowed to leave the building after they had retired to consider their verdict. In the present case, if the argument for the appellants is correct, and there was such pressure from the judge as to render the verdict not a free verdict, there was no true verdict at all and the proceedings were incomplete. In those circumstances there would have been a mistrial, and the court could order a *venire de novo.*

J. J. Deave, in reply. It would not be right to apply the proviso in this case, because the matter goes to the root of the basic principles of justice in this country. If, on the true view, there was improper pressure on the jury, that in itself would be a substantial miscarriage of justice and the proviso would not apply.

Cur. adv. vult.

January 15. The judgment of the court was read by

CASSELS J.: These three appellants were convicted at Nottinghamshire Assizes on November 25, 1959, before Stable J., of the following offences: Busby of stealing 162 television sets, 120 pocket radio sets, six automatic record players, and other valuable electrical equipment, from a Dennis motor-van in the County of Nottingham in May 1959; and also of taking and driving away the same van without the owner's consent; Charles and William McKenna of being accessories after the fact in respect of the same theft.

Busby, a man with a criminal record, was sentenced to three years' imprisonment for the theft, and to six months for taking and driving away the van, these sentences to run concurrently. Charles McKenna, who had a previous conviction in October 1959 of being an accessory after the fact in respect of the theft of certain other television sets, for which he received a term of eighteen months' imprisonment, was now sentenced to two years' imprisonment, the sentence to run as from Commission Day of the assizes. William McKenna, who had only one minor previous conviction, was put on probation for three years.

All three prisoners now appeal to this court, Busby and Charles McKenna by leave of the court and William McKenna with the certificate of the learned judge on a point of law peculiar to his case alone. This was whether a person who, knowing of the felony, assisted not the principal felon, but an accessory after the fact, could thereby be guilty of himself being an accessory after the fact in respect of the same felony. The learned judge ruled that he could, and we agree. Indeed, as a proposition of law this ruling was not seriously disputed before us. The argument addressed to us was that since William McKenna was charged in terms with assisting the principal felon, it would not be enough to justify a conviction that he should be found guilty of assisting an accessory only. But the jury by their verdict found William McKenna guilty of assisting the principal felons. He could do this indirectly by assisting an accessory after the fact to the same felony, and there was cogent evidence that he did so. If, therefore, there were no other ground of appeal in William McKenna's case, there would be no reason for interfering with the verdict.

There is, however, a further ground of appeal common to all three appellants. In the case of Busby and Charles McKenna it is their only ground. It is this: that the learned judge, after the jury had been considering their verdict for over two hours, called them back into court and threatened to keep them together all night and until 11.45 a.m. the next day unless they arrived at a conclusion within the next ten minutes.

The learned judge's actual words, according to the transcript of the proceedings, were these: "I have disorganised my travel arrangements out of consideration for you pretty considerably already. I am not going to disorganise them any further. In ten minutes I shall leave this building and if, by that time, you have not arrived at a conclusion in this case you will have to be kept all night and we will resume this matter at quarter to twelve tomorrow. I do not know, and I am not entitled to ask—and I shall not ask—why in a case which does not involve any study of figures or documents you should require all this time to talk about the matter. May I suggest to you that you go back to your room, that you use your common sense, and do not worry yourselves with legal quibbles? That is what you are brought here for: to use your common sense, bring a bit in from outside. There it is, members of the jury." The jury thereupon retired again and came back into court six minutes later with verdicts of guilty on the charges above set out. It is now said on behalf of all three appellants that the ultimatum delivered by the learned judge was so improper that the convictions should be quashed.

In fairness to the learned judge the following facts should be mentioned: The trial began on Monday, November 23, and at the outset the jury were informed that the court would not sit on the Wednesday afternoon, but would rise at 1 p.m.

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William James McKenna, Charles Alexander McKenna, Arthur William Busby

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The court sat until 5 p.m. on the Monday, and until 6.30 p.m. on the Tuesday. On Wednesday morning the learned judge commenced his summing-up, and at 12 noon he addressed the jury as follows: "Under the rules that govern our procedure once a summing up is finished and the jury retire they cannot separate until the verdict has been arrived at. If in the middle of a summing up a break is requested, the jury can go before the conclusion, and come back and hear the conclusion of the summing up the next day or after the adjournment. The position is this, that I am very much afraid that I have this engagement and I cannot escape it. I have to get up to London by the 1.35 train, which means I shall have to leave here about ten past one. If you feel you cannot arrive at a verdict in this case before then I can break off my summing up at this stage. There won't be very much to add, I can assure you, and you can come back here tomorrow morning at 11.45 a.m., by which time I shall have returned from London, and then I can conclude the summing-up and you can retire and arrive at your verdict. What I want to guard against is one o'clock coming and you saying, 'we still have not arrived at our verdict,' in which case I would have to throw this engagement over and it would be very inconvenient and would keep you all locked up overnight. (The foreman of the jury:) May we discuss that, my Lord? (Stable J.:) I won't finish my summing up, we will have a little break."

The court thereupon adjourned for ten minutes, and upon the resumption at 12.15 p.m. the foreman of the jury informed the learned judge that the jury would require more than three-quarters of an hour to reach a verdict. This, of course, would mean that if the learned judge went on to conclude his summing-up the court could not rise at 1 p.m. as had been arranged. Instead of accepting this position, and concluding his summing-up the next morning, the judge said: "I will catch the later train and I will now run through the indictment again." Having done this, and finished his summing-up, the judge asked the jury to consider their verdict at 12.20 p.m.

They thereupon retired and were out for two hours. At 2.20 p.m. they returned, asking for guidance upon two questions, and this the learned judge gave. One question was whether by wittingly helping an accessory after the fact William McKenna could himself be an accessory after the fact, and the judge, as we have already stated, said "Yes." The other was a question which seemed to indicate that the jury might be convinced that Busby took and drove away the Dennis van in Cambridgeshire but not in Nottinghamshire, as the count in the indictment alleged. They wanted to know if in these circumstances the indictment could be altered. If we may respectfully say so, the learned judge did not seem fully to grasp the point the jury were making. Otherwise he could have told them that they could say, if they so found, that Busby was guilty of taking and driving the van away in Cambridgeshire. Nothing, however, now turns upon this particular point and the answer which the learned judge in fact gave, except that the prosecution, very naturally, stresses the fact that the jury's question showed that they thought that Busby was guilty of this offence, at any rate in the County of Cambridge.

Having received answers to their two questions, the jury retired again at 2.23 p.m. Fifteen minutes later they were apparently brought back into court by order of the judge and he then delivered to them what has been called the ultimatum to reach a conclusion within the next ten minutes or be kept together all night. We think we ought to state that a jury is, in any event, never locked up in the jury room all night, but, if necessary, accommodated in an hotel. This jury may, very understandably, not have known this. After the threat (and we regret we can call it nothing else) that, failing a conclusion in ten minutes, they would be kept together till 11.45 the next morning, the jury arrived at a conclusion adverse to the appellants in six minutes.

It is a cardinal principle of our criminal law that in considering their verdict, concerning, as it does, the liberty of the subject, a jury shall deliberate in complete freedom, uninfluenced by any promise, unintimidated by any threat. They still stand between the Crown and the subject, and they are still one of the main defences of personal liberty. To say to such a tribunal in the course of its deliberations that it must reach a conclusion within ten minutes, or else undergo hours of personal inconvenience and discomfort, is a disservice to the cause of justice. In this case the ultimatum, no doubt, fell with added force upon the jury since two of them were women. It may well be that, having regard to the steps he had taken from the outset to ensure that the case should finish by mid-day on the third day, steps which included working beyond the normal hours on the Monday and the Tuesday, the learned judge was understandably irritated by the inconvenient slowness of the jury in reaching a verdict in what he thought was a plain straightforward case. But juries do at times take much longer than a judge may think necessary to arrive at a verdict; there are, after all, twelve of them who have to be unanimous and the proper exercise of the judicial office requires that irritation on these occasions must be suppressed or at any rate kept severely in check. To experience it is understandable; to express it in the form of such a threat to the jury as was uttered here is insupportable.

What then, in these circumstances, should this court do? The prosecution asked originally that a distinction should be drawn between the cases of Busby and Charles McKenna on the one hand, and William McKenna on the other; and that if the learned judge's ultimatum to the jury were a grievous irregularity, William McKenna's conviction should be quashed, but the other convictions should stand. This was because, in the prosecution's view, the case against Busby and Charles McKenna was overwhelming, but not nearly so strong against William McKenna. Pressed by the court with the strength of the evidence against William McKenna, the prosecution finally submitted that his conviction too ought in any event to be sustained; in other words, that in the case of all three appellants the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied.

We subscribe to the view that the evidence against all three appellants was cogent to a degree. We also agree that it is possible that the jury had little doubt about the guilt, at any rate, of Busby and Charles McKenna. The difficulty, however, is that the opposite view cannot, with complete confidence, be excluded. They had put forward defences which, though they may appear to a lawyer to be fanciful, at any rate had the effect that after two hours the jury still had not arrived at a unanimous verdict. At no stage did they say, as they could have done, that they were agreed in the case of some of the prisoners, but still not agreed as regards another. And when they were told to reach a conclusion as regards all three prisoners within the next ten minutes or in default to remain together all night, it is, at the very least, a reasonable inference that what their minds concentrated upon in these last ten minutes was not so much the evidence they had to consider, but the inconvenience and discomfort with which they had been threatened. This being so, the court does not think it right to resort to the proviso to section 4 (1). The prosecution also submits, as an alternative, that a *venire de novo* should be ordered, but this trial was not, in the true sense of the word a nullity.

With regret, therefore, the court feels bound to quash these convictions. Although any jury would have been amply justified in finding all these appellants guilty of what was, by whomsoever committed, an extremely serious, well planned crime, it is of fundamental importance that in their deliberations a jury should be free to take such time as they feel they need, subject always, of course, to the right of a judge to discharge them if protracted consideration still produces disagreement. Plain though many juries may have thought this case, the principle at stake is more important than the case itself.

The appeals are accordingly allowed and the convictions quashed. In the case of Charles McKenna this will not mean his discharge. He is still serving his sentence of eighteen

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months' imprisonment on another case. In the case of Busby it does mean that he is discharged.

Convictions quashed.

Solicitors: R. A. Young & Pearce, Nottingham, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE SALMON

GEORGE DENNIS GIBBS

1959
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Road Traffic—Convictions of Larceny of Car and of Taking and Driving Away without Owner's Consent—Both Convictions Based on Same Act—Conviction of Larceny Quashed—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 28.

A person cannot be convicted both of larceny of a motor-vehicle and of taking and driving away the vehicle without the owner's consent when both convictions are based on the same act.

Appeal against conviction.

The appellant pleaded guilty at Derbyshire Quarter Sessions on June 26, 1959, to taking and driving away a motor-vehicle without the owner's consent and was convicted of stealing the same vehicle. He was sentenced by the deputy-chairman (Nigel Robinson, Esq.) to concurrent terms of six months' and two years' imprisonment and was ordered to be disqualified for driving motor-vehicles for four years. Both sentences related to the same act.

B. Woods for the appellant.
Charles McCullough for the Crown.

THE LORD CHIEF JUSTICE: This appellant was convicted at Derbyshire Quarter Sessions of stealing a motor-vehicle and was sentenced to two years' imprisonment. On another count in the indictment he had been charged with taking and driving away the vehicle without the owner's consent, and to that he pleaded guilty. The prosecution refused to accept that plea and proceeded on the charge of larceny. The jury

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found him guilty of larceny and he was sentenced to two years' imprisonment for the larceny and to six months', to run concurrently, for taking and driving away the vehicle and his licence was suspended for four years.

One thing is perfectly clear in this case and that is that those two sentences cannot stand. It was exactly the same event with which the offences were concerned in each case. The court has considered the conviction of larceny, and the direction is far from clear. In particular, the deputy-chairman said: "Then let us see how [the prosecution's] case stands on the third count for stealing the motor-cycle. If a man takes a motor-cycle, drives it away and then, when seen by a police officer, makes a run for it, a jury would, in the absence of any explanation by an accused man, be inclined to infer he had stolen it. There is evidence called before you which would entitle you in the absence of any explanation by the accused to draw the inference that he intended to steal." It seems to this court that that direction is clearly wrong in that in the present circumstances the conduct of the appellant could be just as consistent with taking and driving away as with larceny.

The court has come to the conclusion that the conviction of larceny should be quashed. The result will be that the sentence of six months' imprisonment and four years' disqualification for taking and driving away will stand.

Conviction quashed in part.

Solicitors: Blakesley & Rooth, Alfreton, for the Crown.

BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE GORMAN AND
MR. JUSTICE PAULL

ROBERT JOHN WELHAM

1959
Dec. 18

Bail—Dismissal of Appeal by Court of Criminal Appeal—Application for Attorney-General's Certificate for Appeal to House of Lords—Certificate not yet Granted—Meaning of " Appellant "—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 14 (2), *s.* 21.

By section 14 (2) of the Criminal Appeal Act, 1907, " The Court of Criminal Appeal may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal."

When the Court of Criminal Appeal has dismissed an appeal against conviction and a person convicted has applied for the certificate of the Attorney-General authorising an appeal to the House of Lords under section 1 (6) of the Criminal Appeal Act, 1907, the Court of Criminal Appeal has power, while the question of the grant of the certificate is under consideration, to grant bail to the person convicted, as he is an " appellant " within the meaning of section 14 (2), inasmuch as he is " a person who has been convicted and desires to appeal under this Act " within the definition contained in section 21.

THOMPSON (1917) 12 Cr.App.R. 278 considered.

Application for bail.

The applicant was convicted at the Central Criminal Court on December 19, 1958, of uttering forged documents and was sentenced by the Common Serjeant to nine months' imprisonment. On December 16, 1959, his appeal against conviction was dismissed by the Court of Criminal Appeal. He applied to the Attorney-General for a certificate authorising an appeal to the House of Lords and this was still under consideration when the applicant applied to the Court of Criminal Appeal for bail. (See *post*, p. 124.)

C. W. G. Ross-Munro for the applicant.

M. D. L. Worsley for the Crown.

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HILBERY J.: Mr. Ross-Munro applies for bail on behalf of a prisoner named Robert John Welham (referred to hereinafter as "the applicant"), whose appeal against his conviction came before the full Court of Criminal Appeal on December 16, 1959. At the conclusion of the hearing on that day the court dismissed the appeal, stating that it would give its reasons for dismissing the appeal later. Mr. Ross-Munro then intimated to the court that the applicant would apply for the fiat of the Attorney-General, and indeed he informs us now that since December 16 the applicant has so applied for leave to take that decision of the Court of Criminal Appeal to the House of Lords. Mr. Ross-Munro in those circumstances asks the court for bail for the applicant, who had been on bail pending the hearing of his appeal in the Court of Criminal Appeal. The court expressed some doubt whether it had jurisdiction to grant bail and, refusing bail for the time being, gave leave to renew the application for bail, and it is such renewed application for bail that Mr. Ross-Munro makes today.

The question we have to decide, therefore, is whether this court in those circumstances has jurisdiction to grant bail. There is authority by a decision of this court in a case of THOMPSON (1917) 12 Cr.App.R. 278 that where a prisoner who has appealed to the Court of Criminal Appeal obtains the fiat, the court has jurisdiction then to grant bail pending the hearing of the appeal by the House of Lords in respect of which the fiat has been granted. But the question that we have to determine is whether, while the application for the fiat is pending, the court has power to grant bail to the prisoner who is making that application for the fiat. By the Criminal Appeal Act, 1907, section 14 (2), which deals with the admission of appellants to bail: "The Court of Criminal Appeal may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal."

No difficulty arises in such circumstances as obtained in the case of THOMPSON (*supra*) in applying that section, because when the fiat had been granted there clearly was an appeal pending in the House of Lords from the decision of the Court

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of Criminal Appeal by virtue of or under the Criminal Appeal Act, 1907. The question, therefore, narrows itself in the circumstances of the present case into whether, when an appellant's case in the Court of Criminal Appeal has been dismissed and he expresses a wish to obtain the fiat of the Attorney-General in order that he may appeal to the House of Lords, he is in those circumstances an appellant and has an appeal pending. In those circumstances one must look to see what is the definition of "appellant" given in the Criminal Appeal Act, 1907. In section 21, which is called the definition section, and which is one of those sections which does not define but says what is to be included in an expression used in the Act, it is provided: "The expression 'appellant' includes a person who has been convicted and desires to appeal under this Act." If we were to limit the right of an appellant whose appeal has been dismissed by the Court of Criminal Appeal to obtain bail during the period when he is applying for the fiat and the matter of granting the fiat is under consideration, if we were to say he was not within the definition of a person wishing to appeal so that he becomes an appellant under the Act to whom bail may be granted, we should indeed be limiting the effect of that definition section. We should be saying that in those circumstances he is not an appellant until the fiat has been granted, and there is an appeal pending in the House of Lords. That would be treating as an appellant the person who has an appeal actually in being. That would not be giving full effect to the words of the definition, which goes further than that, and says that a person is an appellant who desires to appeal under the Act. The applicant in this case falls, in our view, within that definition, because he is a person desiring to appeal under the Act by virtue of the provisions in the Act which give him a right to apply for the fiat, and, if he obtains the fiat, to have his case carried up to the House of Lords. The situation would, indeed, be strange if we had not this power. A man convicted and sentenced to a short term of imprisonment who was granted bail pending the hearing of his appeal in the Court

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of Criminal Appeal would, if it were otherwise than we are deciding, have no right to do anything except serve possibly the whole of his sentence in prison while the Attorney-General was considering the question of granting his fiat, because if the court dismissed his appeal but said it would give its reasons for that dismissal later, the time necessarily spent in preparing those reasons might mean that the man would have served his whole sentence before the fiat could be granted and his appeal taken to the House of Lords. It would be strange if such were the case, whereas, once the right to appeal to the House of Lords was given, the decision in THOMPSON's case (*supra*) would apply and the court would have jurisdiction to grant bail. In the circumstances, we think we have the power, and this applicant should be granted bail in the same recognisances as he was under when his appeal to the Court of Criminal Appeal was pending. As a matter of convenience he can enter into those recognisances at Wandsworth Prison. Those recognisances can be taken by the Governor of the Prison in which he is at present detained. Then he must surrender on notice to do so from the prosecution.

If the fiat is not granted, he will be sent notice to surrender to this court. He will have to surrender at the time and place designated in the notice given by this court. The sureties will be in the same amount, and if there is any change in the personnel of the sureties they will have to be accepted by the police.

Application granted.

Solicitors: Bellamy, Bestford & Co., for the applicant.

BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE CASSELS AND
MR. JUSTICE EDMUND DAVIES

KENNETH FRANK PRATER

1959
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Corroboration—Accomplice—Witness with Purpose of his own to Serve—Necessity for Warning.

Where it appears that a witness, whether a co-prisoner or a Crown witness, may have some purpose of his own to serve in giving evidence, it is desirable in practice that a warning should be given to the jury with regard to the danger of acting on his uncorroborated evidence similar to that which is given in the case of accomplices, whether the witness can properly be classed as an accomplice or not.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on December 19, 1958, of conspiracy to defraud and uttering forged documents and was sentenced by the Common Serjeant to consecutive terms of two years' and six months' imprisonment.

The appellant was at all material times a director and the secretary of a company known as Motors (Brighton), Ltd., which carried on business in Brighton in motor-lorries, and of which one Welham was the sales manager. The appellant was also a director and the secretary of a company known as Pacca, Ltd., which carried on business in London in furniture. One Goodman was also a director of Pacca, Ltd. In connection with the business of Pacca, Ltd., the appellant had dealings with two hire-purchase finance companies, Consortium Finance, Ltd., and Masterton Finance and Trading Services, Ltd. (hereinafter called " the finance companies "). Between May 1956 and July 1957 the finance companies advanced very large sums of money to Motors (Brighton), Ltd., and Pacca, Ltd., on hire-purchase and credit sale agreements which had been

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witnessed by either Welham or Goodman and which, it was said, were forgeries.

The appellant, Welham and Goodman were all tried at the Central Criminal Court before the Common Serjeant on an indictment containing six counts charging conspiracy to defraud the finance companies and also uttering forged documents with intent to defraud. Goodman pleaded guilty to count 1 (the conspiracy count) and to counts 4, 5 and 6, which charged him with uttering, with intent to defraud, false documents on which Pacca, Ltd., had obtained advances. Welham was found guilty on counts 2 and 3 only, which charged him with uttering, with intent to defraud, false documents on which Motors (Brighton), Ltd., had obtained advances, and was acquitted on the other counts (see *ante*, p. 79). The appellant was found guilty on all counts.

W. R. Fitch for the appellant. A co-prisoner of the appellant, Welham, gave evidence on his own behalf adverse to the appellant. His evidence, although he was a co-prisoner and not a Crown witness, required corroboration in practice and the jury should have received a warning to that effect: GARLAND (1943) 29 Cr.App.R. 46n. and RUDD (1948) 32 Cr.App.R. 138. If BARNES & RICHARDS (1940) 27 Cr.App.R. 154 is to be considered as an authority to the contrary, it should be regarded as having been overruled by the later cases. Secondly, one of the Crown witnesses, Truman, should have been treated as an accomplice, but was not so treated. Thirdly, neither Welham nor Truman, each being an accomplice, could corroborate each other. The summing-up was, in all the circumstances, inadequate.

M. D. L. Worsley for the Crown was not called on to argue.

EDMUND DAVIES J.: The circumstances giving rise to the appeal by Prater now before this court have already been sufficiently summarised in the judgment of the court which has been delivered in the appeal of his co-accused, Welham.

Prater, it will be recalled, was convicted on one count of conspiracy and upon five counts of uttering forged documents. His learned counsel, whose industry is equalled only by the clarity and cogency of his submissions, has urged three matters before this court as being grounds upon which the conviction of Prater should be quashed.

He has said in the first place that Welham was an accomplice. Welham was called on his own behalf, and it is said that, although a co-accused and not a Crown witness, his evidence required to be corroborated, and that there should have been a warning given by the learned Common Serjeant of the danger of acting upon his evidence. The second ground is that one of the Crown witnesses, Mr. Truman, was likewise an accomplice and that there should have been a warning given in regard to his testimony and the danger of acting upon it unless corroborated. The third ground was that neither Welham nor Truman could corroborate each other.

As to the third ground, there has been no sort of contest; it is too well established. In relation to the first matter, that Welham was called on his own behalf and was an accomplice and that a warning should have been given of the danger of acting upon his uncorroborated evidence, the authorities by no means point in the same direction. We have been referred to a number of cases where judgments have been delivered by learned judges of high authority, by Channell J. in SCOTT (1909) 2 Cr.App.R. 215, by Lord Alverstone C.J. in MARTIN (1910) 5 Cr.App.R. 4, and by this court in 1940 in BARNES AND RICHARDS 27 Cr.App.R. 154 on the one hand; on the other hand, by Avory J. in BARROW (1934) 24 Cr.App.R. 141, by Humphreys J. in GARLAND (1943) 29 Cr.App.R. 46n. and again by the last-named judge in RUDD (1948) 32 Cr.App.R. 138.

For the purposes of this present appeal, this court is content to accept that, whether the label to be attached to Welham in this case was strictly that of an accomplice or not, in practice it is desirable that a warning should be given that the witness, whether he comes from the dock, as in this case, or whether

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he be a Crown witness, may be a witness with some purpose of his own to serve. It is to be observed that in DAVIES *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 38 Cr.App.R. 11; [1954] A.C. 378, which went to the House of Lords, Lord Simonds, in enunciating what was described as the third proposition, deals with the matter in these terms (38 Cr.App.R. at p. 32; [1954] A.C. at p. 399): " Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907. The rule, it will be observed, applies only to witnesses for the prosecution."

This court, in the circumstances of the present appeal, is content to express the view that it is desirable that, in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given. But every case must be looked at in the light of its own facts and in GARLAND (*supra*) Humphreys J., delivering the judgment of the court, used words which this court finds completely apposite to the circumstances of the present case, namely, that if there be clear and convincing evidence to such an extent that this court is satisfied that no miscarriage of justice has arisen by reason of the omission of the direction to the jury, this court will not interfere.

On those grounds, and bearing in mind also the proviso to section 4 (1) of the Criminal Appeal Act, 1907, this court sees no reason to disturb the finding of the jury in respect of the first ground relied on by counsel for the appellant. I should have said in dealing with the first ground that it is to be remembered that Prater gave no evidence on his own behalf and none was called for him. Mr. Truman was called as a witness for the prosecution, and a number of suggestions were made to him, of course on instructions, by learned counsel appearing for Prater which appear to have been wholly denied by Mr. Truman. This court has looked in vain at the transcript of the summing-up, and has listened in vain, with respect

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to Mr. Fitch, for any satisfactory indication that there was material upon which the learned Common Serjeant would have been justified in presenting Truman to the jury as being an accomplice. As my brother Hilbery said, it is easy to make suggestions to a witness. That is one thing. More than that is required to clothe a witness for the Crown or any other witness with the garment of an accomplice. This court is unable, on the material before it, to hold that it is shown that any warning was in prudence called for, for it is by no means satisfied that there was any material upon which Truman could properly be described as an accomplice. Here, again, had the matter arisen, this court is satisfied that there was ample and overwhelming evidence of a compulsive character which would have necessitated the court saying that this conviction ought not to be quashed.

For these reasons, shortly stated, this court is of the opinion that this appeal must be dismissed.

Appeal dismissed.

BEFORE

MR. JUSTICE FINNEMORE, MR. JUSTICE DAVIES AND MR. JUSTICE HINCHCLIFFE

GEORGE JOHN FREDERICK DAWSON
ALBERT WENLOCK

1960
Jan. 18, 19, 20, 21, 22, 25, 26, 27, 28, 29;
Feb. 2

Indictment—Conspiracy—Inadvisability of Including Count where Substantive Offences Charged—Multiple Conspiracy Counts—Right to Restore Charges Rejected by Magistrate.

Indictment—Alternative Counts—Conviction on Both—Duty of Court of Criminal Appeal.

Bankruptcy—Statements Made in Bankruptcy Proceedings—Inadmissibility—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), s. 43 (2) (3).

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Obtaining Credit by Fraud—"Credit"—Payment for Goods and Arrangement for Delivery in the Future—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 13 (1).

Where there are substantive charges which can be proved, it is generally undesirable to complicate and lengthen the trial by a count for conspiracy to commit any of these charges. Where such a course is adopted, the jury should be directed to consider the substantive charges first and then proceed to consider how far the count for conspiracy should be there at all and, if so, whether it is made out.

LUBERG (1926) 19 Cr.App.R. 133 and COOPER AND COMPTON (1947) 32 Cr.App.R. 102 followed.

Observations on the undesirability of including in an indictment a long and complex conspiracy count, which may result in charging in one count what is called one conspiracy, but what is in fact several conspiracies.

The right to include in an indictment a count which represents a charge which the examining magistrates have rejected ought to be very carefully used.

Where a prisoner is convicted on both of two alternative counts, there is no rule of law that the Court of Criminal Appeal will treat the conviction as if it had been on the lesser charge only, though the court may do so in a proper case, or if in doubt. It is the duty of the court to look at the realities of the position and it may be proper to affirm the conviction on the count on which the evidence is plainest, even though that be the count charging the major offence.

SMITH (1915) 11 Cr.App.R. 81 referred to.

Section 43 (3) of the Larceny Act, 1916, which provides: "In any proceedings in respect of any offence against sections 6, 7 (1), 20, 21 and 22 of this Act, a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible in evidence against that person" is the only provision of the Act relating to statements made in bankruptcy proceedings. Section 43 (2) does not relate to such proceedings.

Where a person purchases goods and sends money to the vendor, but the vendor does not send them back or hand them over, the vendor has not obtained credit; but, if the purchaser hands over the purchase-money to the vendor with an arrangement that the goods shall not be delivered until some time in the future, then the vendor does obtain credit.

OSBORN *v.* BARTON (1950) 66 T.L.R. (Pt. 1) 115 and INGRAM 40 Cr.App.R. 115; [1956] 2 Q.B. 424 followed.

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GEORGE JOHN FREDERICK DAWSON, ALBERT WENLOCK

Finnemore J., Davies J., Hinchcliffe J.

Appeals against conviction and sentence.

The appellants were convicted at the Central Criminal Court on March 26, 1959, before Judge Aarvold, the appellant Dawson of conspiracy to defraud, fraudulent conversion, causing the delivery of property by false pretences, obtaining property by false pretences and obtaining credit by fraud, the appellant Wenlock of conspiracy to defraud, causing the delivery of property by false pretences, and aiding and abetting the obtaining by Dawson of credit by false pretences. Dawson was sentenced to six years' imprisonment and other concurrent terms; Wenlock to two years' imprisonment and other concurrent terms.

The indictment contained fifteen counts. Dawson was convicted on counts 1, 2, 4, 6, 7, 8, 9, 11, 12 and 14; Wenlock on counts 1, 2 and 14. Count 1 charged both appellants with conspiracy to cheat and defraud such persons as might be induced to part with money and goods in connection with transactions relating to the purchase, sale and processing of orange juice and the purchase, sale and conversion of omnibuses, bogies and landing vehicles and such persons as might be induced to accept liability in respect of bills of exchange accepted by Dawson or by the companies by false pretences and by fraudulent conversion, and by divers other false and fraudulent devices. Count 2 charged both appellants with causing the delivery of a valuable security by false pretences. On count 4 Dawson was convicted of obtaining credit to the amount of £750 by means of fraud. On count 6 Dawson was convicted of obtaining property by false pretences. On counts 7 and 8 (which were in substance alternative) Dawson was convicted of obtaining property by false pretences and of obtaining credit by fraud. On count 9 Dawson was convicted of aiding and abetting the obtaining of credit to the extent of £7,250 by false pretences or by means of other fraud. On count 11 Dawson was convicted of fraudulent conversion. On count 12 Dawson was convicted of obtaining credit by false pretences. On count 14 Dawson was convicted of obtaining

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credit by fraud, and Wenlock of aiding and abetting him. Counts 3, 5, 10 and 13 were not before the court.

In concluding his summing-up the judge said: " You may think a good way to approach the problem would be by considering the first count in the indictment first, that is the count of conspiracy, and making up your minds whether it has been proved that in this case there was a conspiracy in being, whether there was a course of fraudulent conduct agreed by that list of people. If there was not such a course of fraudulent conduct, then you would acquit everybody at once. If there was such a course of fraudulent conduct, you would have to consider who took part in it, and when you made up your minds which, if any, of the defendants had taken part in it, you would then have to consider, when they took part in that dishonest and fraudulent conduct, did they know that was what they were doing. Were they willing participants in dishonest acts? When you have dealt with the first count of the indictment in that way, the rest of the counts in the indictment may fall into a very much smaller compass and be more simple to decide. Because, of course, if you find anyone is not taking part in the fraudulent conduct, if there was such a thing, you would acquit that person, and you would acquit that person of all the counts in which he was involved. If you find a particular person was knowingly taking part in dishonesty and fraud in the way it is suggested, then you would have to turn to the particular count in the indictment in which that particular person is concerned, and then you would have to ask yourselves whether the other matters alleged have been proved to your satisfaction. In the case of obtaining money or credit by false pretences, you will ask yourselves whether it was the fraudulent conduct of the person concerned which operated on the mind of the person who parted with his money. You may think that simpler to consider after you come to your decision of the conspiracy charge."

J. Platts-Mills for the appellant Dawson.
James Burge for the appellant Wenlock.
Mervyn Griffith-Jones and *J. C. Mathew* for the Crown.

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Cur. adv. vult.

February 2, 1960. The judgment of the court was delivered by:

FINNEMORE J.: These are appeals by George John Frederick Dawson, who was sentenced to six years' imprisonment and various lesser terms running concurrently, and Albert Wenlock, who was sentenced to two years' imprisonment in total, against their convictions and sentences at the Central Criminal Court. It is necessary to say that it was a case of very great length and considerable complexity which lasted, we are told, for nine weeks at the Central Criminal Court and the appeal has taken two full weeks to hear in this court. It is also right to say here that we are indebted to counsel on both sides for having put their submissions to us so clearly. There was a mass of evidence which had to be considered. There were some fifteen counts, one count for conspiracy to cheat and defraud and fourteen other counts dealing with various substantive charges. There was, we are told, obviously some difficulty in framing the charges, because they changed from time to time before the accused were committed and, indeed, before the indictment itself was settled. There were several charges which were rejected by the Chief Magistrate at the preliminary hearing, some of which nevertheless appeared in the indictment. That course is permissible and in certain cases may be necessary, but we think it right to say, as has been said by other judges before us, that it is an undesirable practice and can easily in some cases work hardship on defendants, and the right to prefer in the indictment charges which the magistrate has rejected is one which ought to be very carefully regarded. The difficulty of framing some of these charges may be the reason why count 1 charging the conspiracy to cheat and defraud was included.

I hope this judgment is not going to be unduly long, but we are anxious not to keep those concerned in suspense and, still more, we do not wish to raise false hopes which might easily be raised in view of the opinion we have formed on a number of the counts. I propose, therefore, to say at once what is the final result of our decision, and then, I hope briefly, indicate the reasons, count by count. As far as Wenlock is concerned, his appeal will be allowed and the conviction quashed. Dawson's case is very different, and while we are going to quash a number of convictions, we say at once there are several counts upon which he was properly convicted which were serious cases of fraud, and the final result will be that we shall change the sentence overall from six years, to which he was sentenced, to one of four years.

Wenlock was convicted on only two counts, No. 2 and No. 14, plus the count for conspiracy. The first transaction was in January 1955 and the second was in September 1956. There was only one other matter in which he was concerned, count No. 5, on which there was an acquittal, which happened in April 1955. With all the other charges he had nothing to do either directly or indirectly. He was an agent trying to negotiate contracts, mostly on the Continent and in particular in Germany, a country from which we believe he originally came. We think Mr. Burge was right when he said all the contemporary documents in this case, assuming they were genuine, go to prove Wenlock's bona fides, and there is no proof, that we can see, that those documents were not in fact genuine. [After referring to the facts relating to counts 2 and 14, his Lordship continued:]

We think that Wenlock is really a typical example of a man who was sunk by means of a mass of evidence about frauds of different kinds, with the great majority of which he had no connection either direct or indirect, and in which he took no part whatever, and in which his name was never even mentioned. What this court has to remember is that we are not acting as a sort of super-jury and trying to alter the verdict

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of the jury who saw and heard the witnesses, a verdict with which this court is extremely reluctant to interfere in any way, but we think we ought to say this. First of all, this court has the overall duty of seeing there is no miscarriage of justice. It has to see that the verdict is reasonable in view of the actual evidence, and in this case we have ourselves seen the documents on which so much of the case depended. We want to make it quite plain that we are not in any way whatever criticising the jury, nor are we criticising the learned judge, who, if we may say so, subject of course to some matters which were quite inevitable in a case of this great length, summed this case up quite fairly and put quite properly to the jury the defences which had been put forward by the accused persons. However, we have come to the view that the conviction of Wenlock on these two counts and on the count for conspiracy is unsatisfactory and must be set aside and the appeal allowed.

Now with regard to the first count for conspiracy—I propose to say very briefly later what we are doing about the other counts—this court feels it is desirable to say something. This court has more than once warned of the dangers of conspiracy counts, especially long conspiracy counts, which one counsel referred to as a marathon conspiracy count. Several reasons have been given. First of all, if there are substantive charges which can be proved, it is in general undesirable to complicate and to lengthen trials by adding a charge of conspiracy. Secondly, that course can work injustice, because it means that evidence, which otherwise would be inadmissible on the substantive charges against certain people, becomes admissible. Thirdly, it adds to the length and complexity of the case, so that the trial may easily be well-nigh unworkable and impose a quite intolerable strain both on the court and on the jury. We would like to refer once again to what has been said, not once but numbers of times, in this court. There is first the case of LUBERG (1926) 19 Cr.App.R. 133 where Sankey J., as he then was, giving the judgment of the court (at p. 137), referred to what was said by Cockburn C.J.:

"There is the well-known case of BOULTON AND OTHERS (1871) 12 Cox C.C. 87 where Cockburn C.J., in summing up, refers to this procedure and says (at p. 93): 'I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it, for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences, which, if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others, and deprive defendants of the advantage of calling their co-defendants as witnesses.' It is perfectly true that that case was different from the present one. It is equally true that since the decision in that case an Act of Parliament has been passed which enables a prisoner to go into the witness-box and give evidence. It is a perfectly admissible and proper course to pursue, and a course which is often pursued, but we think that if that course is pursued, great care and great caution is necessary during the hearing of the evidence to be quite sure that no evidence is given which is inadmissible, and great care is required in the summing-up to keep all the several issues perfectly clear." Again, he said at p. 139 in regard to the summing-up: "The judge does not, I think, at the end of his long summing-up"—which was not otherwise at all criticised—"in one way put it quite correctly, where he says: 'That is the whole case and you must take it as a whole and not by bits.'" That is very like the direction given to the jury in the present case; they were told to look at the whole of the case, and having formed a view about the whole of the case, which really means the conspiracy, then proceed to the substantive charges. We think the proper course is to proceed the other way, to deal with the substantive charges and then proceed to see how far the conspiracy count should be there at all and if it is made out. On the other side we would refer to the case of MEYRICK and RIBUFFI (1929) 21 Cr.App.R. 94 and also the case of

HAMMERSLEY (1958) 42 Cr.App.R. 207, fairly recent cases, but the difference in those cases is that in each case the court held that there was only one conspiracy, even though people took part in it independently of one another, and in one case not even knowing the course of the main person in the conspiracy. They were both conspiracies to defeat the ends of justice, and both dealt with bribes given to police officers in order to allow infringements of the law to take place. The case of LUBERG (*supra*) and the quotation from Cockburn C.J. in BOULTON (*supra*) were again referred to in COOPER AND COMPTON (1947) 32 Cr.App.R. 102 and, without going into it further, this court suggests that, when counsel have to deal with these problems, they would do well to read again and bear in mind the judgment of this court delivered in that case by Humphreys J.

There is more than this in the present case, for this court, after very careful consideration of this point, is of opinion that this was not one conspiracy. Although conspiracy there may have been, it was a number of conspiracies. Dawson was dealing with orange juice; he was dealing with buses, bogies and landing vehicles, and he was dealing with bills of exchange, with different kinds of people at different times over a period of three years. The count charges conspiracy with some twelve men, of whom six were actually charged and three convicted. It is an odd circumstance that one person named Eland was included in a count as one of the conspirators, and in a later count included as one of the victims, which illustrates again the great difficulties in which one is placed by these abnormally long conspiracy charges. In addition to the other matters we have mentioned, we are satisfied this was not one conspiracy, and it is no more correct to charge several conspiracies, though they are called one conspiracy, than it is to include other different charges, in one count. Again we want to say in the strongest possible way that, quite apart from the fact that we think it is wholly undesirable, in this case it was obviously quite unnecessary to have a long count of this kind, because it has lengthened the case enormously, and we think in the result

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to which we have come it plainly worked an injustice on one at least of the appellants before this court today. Therefore we quash the convictions on the first count.

[His Lordship then said that the convictions of both appellants on counts 2 and 4 and the conviction of Dawson on count 6 must be quashed, and continued:] Counts 7 and 8 are very different. Of course Mr. Platts-Mills made no sort of admission, but the real case on counts 7 and 8—that is why I take them together—was that the jury were wrong in convicting Dawson on both counts because they were alternative counts. That we take to be right. One was a charge of false pretences on which he was sentenced to five years' imprisonment, and the second, dealing with exactly the same matter, charged him with obtaining credit by fraud other than false pretences, on which he was sentenced to twelve months' imprisonment. Mr. Platts-Mills developed his argument to say if that mistake is made and a person is convicted on two alternative counts, the rule is that the court should act on the lesser of the two and pass the smaller sentence. Now in our opinion that really is not a rule. The principle is laid down in SMITH (1915) 11 Cr.App.R. 81. The Lord Chief Justice (Lord Reading) in that case said that, no doubt, the court should, and in a proper case would, treat the conviction as if it had been upon the lesser of the charges. That was not a direction or a rule, and in a previous case which is referred to in that case, JOHNSTON (1913) 9 Cr.App.R. 262, it was said that if the court is in doubt, then it should choose the lesser of the two charges of which the man has been convicted. We think it is the duty of the court to look at the realities of the position, and in our view there was the plainest possible evidence of false pretences. We think the false pretence count, which is No. 7, is the proper one on which the conviction should be recorded and not, as it happens in this case, the lesser offence contained in count No. 8. It was a false pretence in which a wrong letter, amongst other things, was handed to the man concerned saying that the companies for whom the work was being done had many assets, including some £60,000 worth of stock and had negligible liabilities, when in fact the companies concerned were insolvent. There were other matters as well, but we think it is a very plain case and a bad case of false pretences. We therefore affirm the conviction on count 7 upon which a sentence of five years was passed, which we think appropriate to reduce to a sentence of four years.

[His Lordship then said that the conviction of Dawson on count 9 must be quashed, but that on counts 11 and 12 there was sufficient evidence to affirm the conviction, and continued :] There is, however, another point which arises on count 11, which is an offence under section 20 (1) (iv) (*a*) of the Larceny Act, 1916. Mr. Platts-Mills raised two points here. For some reason on this count—and on this count only—evidence was proffered and admitted of part of Dawson's public examination in bankruptcy, and Mr. Platts-Mills took two points first, on section 43 (2) and, secondly, section 43 (3) of the Act. Subsection (2) says: " No person shall be liable to be convicted of any offence against section twenty "—I leave the others out—" upon any evidence whatever in respect of any act done by him, if at any time previously to his being charged with such offence he has first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which has been bona fide instituted by any person aggrieved." He said that no proceedings could be taken on this matter and the count would fail. Mr. Griffith-Jones's answer to that is that that section does not apply to bankruptcy proceedings.

It seems to this court, having been referred to the relevant authorities, that that is the correct view. In the Larceny Act, 1861, there was section 85 in which this provision first appeared. The interesting thing about that section is that, having used very much the words I have just read from the Larceny Act, 1916, it added this, " or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency." That would seem to suggest that the subsection, as I read subsection (2) of section 43 of the

Larceny Act, 1916, would not apply to bankruptcy proceedings. But again in the 1861 Act special provision was being made that such a similar protection should be given to a man who first disclosed offences of this kind in bankruptcy proceedings. The matter becomes, it seems to us, quite plain when we look at the Bankruptcy Act, 1890, s. 27 (rep.), because in that section it says: "There shall be repealed so much of section eighty-five of the Act," that is the 1861 Act, and then it goes on to say there shall be repealed this very provision, and it puts in a new subsection, that is section 27, subsection (2): "A statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in any proceedings in respect of any of the misdemeanours referred to in the said section eighty-five." It appears to us to be as plain as anything can be that the legislature repealed the protection of what is now subsection (2) of section 43 as applying to bankruptcy matters, and gave a new protection, that is section 27 (2) of the Act of 1890, which is now subsection (3) of section 43 of the Larceny Act, 1916. Therefore, we think subsection (2) of section 43 had no application to this case, but we do think subsection (3) applies, and we think this evidence was in fact inadmissible.

Now we have to consider another matter which was also urged on this point by Mr. Griffith-Jones: Did it in fact have any real effect upon the jury? We do not quite know why it was ever thought to be necessary, much less desirable, to tender this evidence, or why it was allowed to be given, but we have read it and considered it and heard the arguments about it. We think it is a proper case in which we can say we do not think the questions which were in fact admitted from the public examination should have had any real effect upon the jury or could have influenced them in any way in coming to the verdict which they did on this count. We therefore think it is right in the interests of justice to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, because we think no miscarriage of justice resulted from it. Therefore we have affirmed the convictions on count 11 and also on count 12, and we think the proper sentence on count 11 is four years' imprisonment to run concurrently with the other sentence, and on count 12 twelve months' imprisonment, also to run concurrently.

That leaves only count 14, to which I have made some reference already as far as Wenlock is concerned. In this case the major charge is against Dawson, and Wenlock was charged with aiding and abetting him. As far as Dawson is concerned, the charge is one again of obtaining credit. What happened, shortly, was this. He sold to Pearson a quantity of orange juice which was seen by Pearson, or by someone on his behalf. It was tested by somebody on Pearson's behalf, and it was situated then either at Smarden or West Ferry. The contract was for 30,000 gallons, and if there was not that quantity of orange juice at the proper place where the sale took place, Dawson was to make it up with orange juice which he obtained elsewhere. £750 was paid quite plainly, as it seems to us, as part of the purchase price, and the argument was that inasmuch as there was not in fact 30,000 gallons in the place and he therefore would have to get other orange juice to make up the quantity, it was in fact a case of his being given credit. We would refer to various cases on this question, which arises on some other counts as well, OSBORN *v.* BARTON (1950) 66 T.L.R. (Pt. 1) 115 and INGRAM, 40 Cr.App.R. 115; [1956] 2 Q.B. 424. We think the principles are not really difficult. If a person buys goods and the man to whom he sends the money does not send the goods back to him or hand them over, it does not mean the purchaser has given him credit. The vendor may be guilty of other frauds, but he is not guilty of obtaining credit. On the other hand, if by arrangement a purchaser hands over to a person the purchase-money for the goods with the arrangement that the goods are not going to be delivered until some time in the future, then that may be a case, as in INGRAM (*supra*), of credit being enjoyed by the person who has got to supply the goods. We do not think that this case

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falls within that principle. We do not think in any real sense it can be said that under this count, whatever else he may have done, Dawson in fact obtained credit. Therefore, the conviction on that count is also quashed.

The result is that the appeal of Wenlock is allowed and the conviction quashed. With regard to Dawson, on count 7 and on count 11 there is substituted a sentence of four years' imprisonment to run concurrently, and on count 12 a sentence of twelve months' imprisonment to run concurrently. That will run from the original date.

One conviction quashed.
One conviction quashed in part and sentence reduced.

Solicitors: G. B. Hemming & Son, for the first appellant. H. Davis & Co., for the second appellant.

[JUDICIAL COMMITTEE OF THE PRIVY COUNCIL]

BEFORE

VISCOUNT SIMONDS, LORD RADCLIFFE, LORD TUCKER, LORD JENKINS AND LORD MORRIS OF BORTH-Y-GEST

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Insanity—Uncontrollable Impulse—Effect on M'Naughten Rules—Direction to Jury.

In a case where evidence—and it would be difficult to imagine that such evidence could be other than medical evidence—had been given that uncontrollable impulse was a symptom of the particular disease of the mind from which the prisoner was said to be suffering and of its effect on his ability to know the nature and quality of his act or that his act was

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wrong, it would be the duty of the judge to deal with the matter in the same way as with any other relevant evidence given at the trial.

SODEMAN *v.* R. [1936] W.N. 190; 55 C.L.R. 192 approved.

Apart from such a case as is referred to above, the law does not know or recognise uncontrollable impulse as a symptom of legal insanity within the meaning of the M'Naughten Rules. To direct a jury that, regardless of medical evidence or the absence of it, evidence of uncontrollable impulse may afford ground for the inference that the prisoner was labouring under such a defect of reason from disease of the mind as not to know that what he was doing was wrong amounts to a misdirection.

KOPSCH (1925) 19 Cr.App.R. 50 and RIVETT (1950) 34 Cr.App.R. 87 followed.

Dicta of Greer J. in TRUE (1922) 16 Cr.App.R. 164, at p. 167, not followed.

Appeal by the Attorney-General for South Australia from a judgment of the High Court of Australia quashing a conviction of murder.

On March 20, 1959, John Whelan Brown (hereinafter called the respondent) was convicted in the Supreme Court of South Australia of murder and was sentenced to death. On April 15, 1959, the Full Court of the Supreme Court of South Australia dismissed an appeal by the respondent. On May 20, 1959, the Full Court of the High Court of Australia allowed an appeal by the respondent against that decision, and quashed the conviction and ordered a new trial. From that decision the Attorney-General for South Australia appealed by special leave to the Privy Council. The appeal was heard by the Board on January 25, 26, 27 and 28, 1960. The facts are set out fully in the judgment of the Board.

T. G. Roche, Q.C., *D. A. Grant* and *W. A. N. Wells* (of the South Australian Bar) for the appellant.

L. J. Elliott (of the South Australian Bar) for the respondent.

March 9. The judgment of the Board was delivered by:

LORD TUCKER: On March 20, 1959, the respondent was found guilty of the murder of Neville Montgomery Lord on

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November 23, 1958, after a trial before Abbott J. and a jury in the Supreme Court of South Australia at Adelaide. He was sentenced to death. From this conviction he appealed to the Full Court of the Supreme Court of South Australia (Napier C.J., Mayo and Piper JJ.), who dismissed the appeal. From that judgment the respondent appealed to the High Court of Australia (Sir Owen Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ.), who allowed his appeal, quashed the conviction and ordered a new trial. The Attorney-General for South Australia obtained special leave by Order in Council dated August 12 to appeal from this decision of the High Court and the appeal was heard by the Board on January 25, 26, 27 and 28, 1960.

The following summary of the facts relating to the killing of Mr. Lord, which were not in dispute, is taken from the judgment of the High Court. Shortly before November 20, 1958, the respondent was engaged in Adelaide as a station hand for Pine Valley, which is a sheep station about sixty-five miles north of Morgan. Mr. Lord was a member of a family to whom the station belonged and had been manager of the station for some years. He was thirty-two years of age and lived at the homestead with his wife and two young children. There was a station cook, a woman whose room was adjoining to, but not part of, the main building. The men station hands, of whom there was only one other, lived in the men's quarters, perhaps seventy-five to 100 yards away. On the morning of Thursday, November 20, 1958, the respondent was picked up in Adelaide by a car proceeding to Pine Valley and taken to his new job. He met Mr. Lord on arrival at the station that afternoon. He was given his room in the men's quarters and made the acquaintance of the other station hand and the cook. The latter saw him at meal-times during the next three days and he helped her with the drying of dishes. Nothing occurred to excite comment. The respondent seemed quiet and well-behaved. Mr. Lord saw little of him and all were sure that nothing had passed between them that could excite any hostility in the respondent to Mr. Lord. The other station hand went off for the weekend. In his room there stood, visible from the door, a .303 rifle and there were some cartridges in the room with soft-nosed bullets for shooting kangaroos. On Sunday night, November 23, Mr. Lord went to bed about 9.15. Mrs. Lord busied herself for a little longer and went to the children's room between which and the bedroom there was a communicating door. She was attending to a child when, as she says, she heard the electric light go on in the bedroom. Then there was a shot. She ran through the connecting door and saw her husband lying on the bed shot through the head. She threw herself on the bed. The respondent came back through the passage door. She screamed and he told her to be quiet, and, after trying to quieten her, he ran out of the bedroom into the hall or passage. That led to the front door, about a yard distant, and also to the back door. She described him as looking bewildered and explained that she meant that she thought he might have been taken aback because she had come from the next room, not knowing there was a door between. She did not see him again. She found the cook in her bedroom and they telephoned for help. A doctor and a policeman arrived two or three hours later. Her husband was dead. The respondent had disappeared. A search extended for him over the next four days. On the morning of Friday, November 28, he came from some disused buildings some twenty-five miles from the homestead of a station named Canegrass and gave himself up. Canegrass homestead itself is twenty-four miles south of Pine Valley homestead. As the respondent gave himself up, he asked: "Is he dead?" He had carried the rifle for a time, but had abandoned it at a place about six miles from Pine Valley homestead. He answered the questions put to him by the police then and thereafter without any apparent reservation. According to the answers, he had gone to bed in his quarters at about 8.30 on the Sunday night. He remained awake thinking and then got up and got the rifle from the room of the other station hand and then tested the loading of the rifle on the bed. He took the rifle and cartridges; the

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magazine was full. He went across to the house, wearing socks, but no boots or shoes. The lights were on and through the window he could see Mrs. Lord in another room. He walked in the front door, went to the bedroom, put the rifle up, aimed it at Mr. Lord and shot him. He was under the blanket and appeared, so the respondent thought, to be asleep. He said he went out of the room to see where Mrs. Lord was. She went into the bedroom and he then returned. He tried to quieten her and then ran out the back way. He went to the cook's quarters to see where she was. In answer to a question why he did so, the respondent answered: " Because I thought she might have rung up and given the alarm." Her light was then on, but he could not see her through the window. He then returned to his quarters and took his hat, the rifle, and a pair of boots from the other station hand's room and set off. He said that neither Mr. Lord nor any other person there had given him any reason to bear malice or had any argument with him.

The only real issue in the case was whether the defence had discharged the onus of proving, on the balance of probability, that the respondent was legally insane when he shot Mr. Lord. This issue was further narrowed since the medical witnesses for the defence and the prosecution agreed that the respondent was (i) what psychiatrists refer to as a schizoid personality; (ii) that neither before nor after the shooting was the respondent suffering from any disease or disorder of the mind; and (iii) that, at the moment of the shooting, he knew the nature and quality of his act. Where they differed was that Dr. Forgan for the defence testified that, in his opinion, at the time of the shooting the respondent had lapsed into a temporary state of schizophrenia in which he did not know that what he was doing was wrong. Dr. Shea, on the other hand, was of opinion that the respondent never at any time had schizophrenia and that, even if he did, he not only knew the nature and quality of his act, but also that it was wrong, as the respondent had told him when he examined him in prison. [His Lordship then referred to the medical evidence in detail, and to passages in the summing-up of the trial judge, and continued:] The passages in the High Court's judgment which criticised the summing-up and the trial judge are the following: "After setting out the facts relating to this and recalling [the respondent's] statement that he had gone to bed on the Sunday night and had then got up and taken the rifle, the charge to the jury proceeded in a manner which we think very much open to objection. It is desirable to set out the passage in full. 'The [respondent] himself owned no firearms and probably, had he never seen the rifle and ammunition in Dave's room, he might never have thought of shooting anybody. You will remember Mr. Elliott [counsel for the respondent] drawing your attention to the fact that there was no motive for this alleged crime. Gentlemen, throughout the centuries of civilisation, crimes have repeatedly been committed without any apparent or discoverable motive. That is one of the reasons why, in our childhood, we were taught never to put temptation in anybody's way, and that what could be temptation for another man, might be no temptation whatsoever to us. You may, perhaps, remember the words of Shakespeare: "How oft the sight of means to do ill deeds makes ill deeds done." There, standing before his eyes, in Dave's empty room was the rifle and ample ammunition and there was the means to do ill deeds. Do you think that perhaps those means to do ill deeds made the ill deeds done in this particular case? You may, perhaps, think that on November 23 the [respondent], when he shot Neville Lord, was acting on an uncontrollable impulse—a dreadful impulse which arose suddenly and which he was unable to control. If the view should commend itself to you, it is my duty to direct you that that is no defence in law. The defence of uncontrollable impulse is unknown to our law, and if it, in your considered view, is the only explanation of the death caused by the [respondent] on November 23, it is your duty to bring in a verdict of Guilty of murder.'

"At a later point in his charge to the jury the learned

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judge returned to the answer that the [respondent] had given to the question of the police officer whether he knew at the time that it was wrong to point a loaded rifle at a person and shoot him, namely the answer: 'Yes, but I could not help myself.' His Honour said: 'These words, gentlemen, may suggest to you that the [respondent] was thereby setting up the defence of "uncontrollable impulse," which you may think is the true explanation of what he did. But, as you will remember, gentlemen, I have directed you, if that be the true explanation of what the [respondent] did, that is no defence, and he is guilty in law of the crime charged.'

"The objections to those passages, which, of course, must be taken together, are, we think, very serious. The foundation of the case in support of the plea of insanity was that the [respondent's] act in shooting Mr. Lord as he lay asleep lacked any motive actuating a sane mind. Upon this the evidence was entirely one way. Irresistible impulse as such had not been raised as a defence and no one had suggested that it could amount to a defence. The manner in which the first of the foregoing passages discounted the importance or effect of the absence of ascertainable motive put this cardinal matter, to say the least of it, in a false light. It was not at all unlikely to produce an adverse effect upon the jury with respect to that very element in the case for the respondent which, if one were guided by the evidence, there was no reason to doubt. What follows immediately concerning temptation and the sight of the means to do ill deeds might not carry any very clear meaning to the jury, but its tendency could hardly be anything but prejudicial. For it might be taken by them as suggesting that the [respondent], finding a weapon available, was prompted to use it to shoot Mr. Lord, for a reason which existed, but was not ascertainable. Then the possibility is introduced of the jury thinking it was uncontrollable impulse. The result is a direction about uncontrollable impulse which, if understood literally, is clearly erroneous in point of law. For it is a misdirection to say that, if the jury think that the true explanation of

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what the accused did was that he acted under uncontrollable impulse, that is no defence and he is guilty in law of the crime charged. It is a misdirection the operation of which might be to exclude the prisoner's defence and to determine the verdict. Whatever the learned judge may have had in mind in using the word ' only ' when he first gave the direction about uncontrollable impulse, the second statement says in plain terms that, because the killing was done under uncontrollable impulse, if that were the jury's opinion, therefore it amounted to murder and they must convict the [respondent]. It may be true enough that although a prisoner has acted in the commission of the acts with which he is charged under uncontrollable impulse, a jury may nevertheless think that he knew the nature and quality of his act and that it was wrong and therefore convict him. But to treat his domination by an uncontrollable impulse as reason for a conclusion against his defence of insanity is quite erroneous. On the contrary, it may afford strong ground for the inference that a prisoner was labouring under such a defect of reason from disease of the mind as not to know that he was doing what was wrong. The law has nothing to say against the view that mind is indivisible and that such a symptom of derangement as action under uncontrollable impulse may be inconsistent with an adequate capacity at the time to comprehend the wrongness of the act. This was put succinctly by Greer J. during the argument of the case of TRUE ((1922) 16 Cr.App.R. 164, at p. 167), in stating how in an earlier case he had directed the jury. His Lordship said: ' What I really told the jury was that the definition of insanity in criminal cases was the one laid down by the judges in M'NAUGHTEN'S CASE (1843) 10 Cl. & Fin. 200, but that men's minds were not divided into separate compartments, and that, if a man's will power was destroyed by mental disease, it might well be that the disease would so affect his mental powers as to destroy his power of knowing what he was doing, or of knowing that it was wrong. Uncontrollable impulse in this event would bring the case within the rule laid down in M'NAUGHTEN'S CASE (*supra*).'

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For that reason, even if no more had been said than that uncontrollable impulse does not amount to a defence, the fact that the subject was mentioned would make it necessary to put before the jury the true operation of uncontrollable impulse as a possible symptom of insanity of a required kind and degree.

"It is not outside the province of a judge in a criminal trial to put to the jury a view which he may take of a piece of evidence or of facts. How far he should go must depend upon circumstances; but if he does so and puts views adverse to the prisoner, it increases the importance of his putting clearly and in its true light the case made for the prisoner, or for that matter the case for him that fairly arises on the evidence, however little validity in fact the judge may be inclined to ascribe to it. It is difficult to resist the impression that the position taken up by Dr. Forgan was not placed before the jury by the summing-up in a way which could be understood and appreciated. Perhaps that arose from the evident difference between the view expressed by the learned judge about the absence of known motive and the central significance the witness placed upon the motiveless character of the act. Doubtless it is true, as the learned judge pointed out, that the jury might reject the views of the experts, but this possibility leaves untouched the defect in the summing-up. Nor did the rejection of the view that the [respondent] had suffered from schizophrenia necessarily dispose altogether of the question whether there had existed a disease or disorder of the mind which might satisfy the prerequisite condition required by the formula. In all the cases we think that the cumulative effect of the positive objections to those passages in the charge which we have discussed is such that the conviction ought not to be allowed to stand."

It is the concluding lines of the penultimate paragraph beginning with the words "on the contrary" which, in their Lordships' view, give rise to questions of great importance and far-reaching consequences in the administration of the criminal law. They would naturally be read by the judge who

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presides over the new trial, and by all judges in similar cases in states where the English common law prevails, as requiring them to tell the jury *as a matter of law* and in the absence of any medical evidence to that effect that irresistible impulse is a symptom of some disease or disorder of the mind which, although not preventing the patient from knowing the nature and quality of his act, yet does prevent him from knowing that it is wrong.

The words " the true operation of uncontrollable impulse as a possible symptom of insanity of a required kind and degree " must imply that the law knows and recognises uncontrollable impulse as a symptom of legal insanity within the meaning of the rule in M'NAUGHTEN'S CASE and, in conjunction with the language used at the beginning of the passage in question, that it is the judge's duty to instruct the jury that it may afford strong ground for the inference that the prisoner was labouring under such a defect of reason from disease of the mind as not to know that he was doing what was wrong. Furthermore, this direction is required not only in a case where there may have been no medical evidence but even in a case, such as the present, where the medical evidence for the defence was to the effect that the prisoner when he committed the act was suffering from a specific disease or disorder of the mind known as schizophrenia which, although not preventing him knowing the nature and quality of his act, did prevent him from knowing it was wrong, but of which it was never suggested that irresistible impulse was a symptom or that it played any part in helping the medical witness for the defence to arrive at his diagnosis. So much so that counsel for the respondent on the present appeal, far from relying on irresistible impulse, contended that the trial judge should never have mentioned the subject in his charge to the jury as it formed no part of the case for the defence. Their Lordships can find no support for the view that this accurately represents the criminal law.

At various times in the past attempts had been made to temper the supposed harshness or unscientific nature of the

M'Naughten Rules. These attempts were supported by the high authority of Sir James Fitzjames Stephen, but in the end they remain in full force and their harshness has in this country been to some extent alleviated by the recent legislative enactment affording the defence of diminished responsibility. While the High Court, of course, fully recognise the binding force of the M'Naughten Rules, their Lordships think that the directions which they have indicated as appropriate for use by trial judges would, in effect, make a very considerable inroad into those rules as hitherto interpreted. Moreover, unless the law is presumed to take cognisance of irresistible impulse as a symptom of legal insanity, whence does the judge derive his knowledge of these matters, it not being permissible for him to make use of what he might have learned from evidence given in other cases?

Their Lordships must not, of course, be understood to suggest that in a case where evidence has been given (and it is difficult to imagine a case where such evidence would be other than medical evidence) that irresistible impulse is a symptom of the particular disease of the mind from which a prisoner is said to be suffering and as to its effect on his ability to know the nature and quality of his act or that his act is wrong, it would not be the duty of the judge to deal with the matter in the same way as any other relevant evidence given at the trial. SODEMAN *v.* R. ([1936] W.N. 190; 55 C.L.R. 192) is an Australian example of such a case. The actual decision in that case related to the burden of proof in cases where the defence of insanity is raised, but, in the course of the judgments, references were made to "irresistible impulse" and its possible bearing on the defence raised by the medical evidence in that case to the effect that, if a man has an obsession and if he gives way to that obsession and does the thing which is always before his mind as the thing he wants to do, then in doing it he does not know the quality of his act, he does not know what he is doing, and does not know whether it is right or wrong (*vide* the judgment of Latham C.J., 55 C.L.R. at p. 203). The learned Chief Justice later (at

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p. 205) used these words: " But, on the other hand, it should be remembered that, as already stated, the law recognises that mental disease manifested in, for example, what is called ' uncontrollable impulse,' may also be manifested in lack of knowledge, or incapacity to have knowledge, of the nature and quality of an act or its character as a wrong act. Such an impulse may be evidence of this very lack or incapacity. Indeed, that was the effect of the medical opinions given in evidence in this case, and this aspect of the case was definitely put to the jury by the judge." This passage must be read in the light of the concluding sentence. So read, their Lordships would not question it; but if the word " recognises " in the first sentence is construed to mean that the words which follow are matters of law which must or may be accepted and acted on by juries without evidence, it would not, in their Lordships' opinion, be an accurate statement of the law. The word " recognises " would seem to have been used in contrast to the rejection of irresistible impulse *per se* and means no more than that the law will not refuse to listen to evidence to the effect stated, whereas it will refuse to listen to evidence of irresistible impulse *per se*. The presumption that the law takes note of such matters without evidence is implicit in the language of the High Court's judgment in the present case. It is this that their Lordships, with great respect, feel unable to accept.

It may be observed in passing that in PORTER (1933) 55 C.L.R. 182 the charge to the jury by Dixon J., in which he dealt with the workings of the human mind, appears to have been based on the medical evidence given in that case (*vide* at p. 189: " The medical evidence included explanations of the cause of mental conditions in human beings generally "). This distinction between what the law presumes and what the law will listen to is of the first importance in the present case, since counsel for the respondent has disclaimed any reliance on irresistible impulse either *per se* or as an element in the particular kind of mental disease relied on to support the defence that the respondent, although aware of the nature and quality of his act, did not know that it was wrong, and submitted that the trial judge should never have referred to it in his charge to the jury.

Their Lordships do not derive much assistance from the interlocutory observations of Greer J. during the argument in TRUE (*supra*). He was speaking from recollection of his summing-up in a case which he had tried two years earlier and in which no medical evidence had been given. No reference was made to his observations by the other members of the court and no authority has been cited in which the Court of Criminal Appeal has given its approval to such a direction. In none of the leading cases in recent years, such as KOPSCH ((1925) 19 Cr.App.R. 50) and RIVETT ((1950) 34 Cr.App.R. 87), where the defence of insanity was raised, has there been any suggestion that, although irresistible impulse affords no defence *per se*, the law will recognise it as a symptom from which the jury may without evidence infer insanity within the M'Naughten Rules. In the latter of these cases, the defence of insanity was based on evidence almost identical with the medical evidence in the present case. It may, perhaps, be observed in passing that, if such matters were left to a jury without the assistance of medical evidence, there would seem to be two possible views which a layman might take as to the relevance of irresistible impulse to the M'Naughten tests. Some might think that, before an impulse becomes irresistible, there must have been some attempt to resist it, and that the attempted resistance might well be due to knowledge of the wrongness of the act to which the prisoner felt himself impelled. Others might think that the irresistible impulse might impair the reasoning power to such a degree that it would no longer be able to appreciate the wrongness of the act. Why should the law prescribe that one of these views must be presumed to be correct rather than the other without medical evidence as to which is to be preferred with reference to the particular form of mental disease or disorder from which a prisoner is said to have been suffering? Their Lordships are not, of course, suggesting that legal insanity cannot be sufficiently proved without medical evidence. The previous and contemporaneous acts of the accused may often be preferred to medical theory. But where the whole case for the defence is based upon the accused having a particular form of mental disease such as schizophrenia, the nature and symptoms of which are known to psychiatrists, but knowledge of which cannot be attributed to a jury, the law will not step in to instruct a jury in the absence of medical evidence as to the " true operation of uncontrollable impulse as a possible symptom of insanity of a required kind and degree."

In arriving at a conclusion different from that of the High Court on a matter of this kind, their Lordships may perhaps derive some comfort from the fact that they had had the advantage of a very full and helpful argument from both sides on this aspect of the case, whereas they are informed that, this particular matter not having been raised by the defence either in the Full Court or the High Court, but having been taken by the court in the course of argument in the High Court, counsel may not have developed their arguments quite so fully or had so much opportunity of considering the matter as they have now been afforded.

Their Lordships now turn to other matters, which, though no doubt of great importance in the present case, are not of such a nature that their Lordships would normally investigate them on appeal from the High Court. [His Lordship referred to various criticisms of the summing-up of the trial judge and, in particular, the allegations that he did not put the case for the defence and the medical evidence fairly or sufficiently before the jury. During the course of these, His Lordship said: " The Board were informed that it is common practice for counsel in South Australia in their addresses to juries in murder trials to refer to the consequences of their verdict. If such a practice is permitted, it is incumbent upon the judge to instruct the jury that such matters are not their concern and are completely irrelevant to any issue they have to determine." After dealing with other criticisms, His Lordship continued:] On this aspect of the case the Full

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Court of the Supreme Court of South Australia subjected the judge's charge to the jury and the evidence at the trial to a careful and detailed scrutiny, they referred to the authorities which have stated the principles—if they can properly be so called—on which an appellate court will quash a conviction on the ground of misdirection or non-direction with regard to the evidence given at the trial or the presentation of the defence, and came to the conclusion that the summing-up of the trial judge was sufficient. Their Lordships have gone through the same process and are content to adopt that view.

In the result, for the reasons indicated, their Lordships, after anxious consideration of the questions raised in this appeal, some of which are of great importance in the administration of justice in murder cases involving the defence of insanity, are of opinion that no sufficient grounds have been established in this case to justify an appellate court in quashing the verdict and judgment of the trial court. In conclusion their Lordships may perhaps permit themselves to refer to the concluding words of the judgment of the Full Court of the Supreme Court of South Australia: "While we really have no doubt that the verdict was right in point of law (in so far as the appellant must be taken to have known what he was doing and that it was wrong), nevertheless we think that there is ground for surmising that the appellant may have suffered from some such abnormality of mind as might, under the recent amendment of the law in England, be held to diminish his responsibility. That opinion is based very largely upon the evidence of Dr. Shea," and, without expressing any view one way or the other with regard to the correctness of the verdict which they think would be outside their province, to express their concurrence in the concluding words of those observations.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgment of the High

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Court set aside, and the verdict and judgment of the trial court restored.

Appeal allowed.

Solicitors: Blyth, Dutton, Wright and Bennett, for the appellant; Lawrence Jones & Co., for the respondent.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE ASHWORTH

OLIVER GEORGE CHAPMAN
JAMES GEORGE PIDGLEY

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Probation Order—Breach—Finding by Magistrates' Court—Certificate of Justices—Admissible but not Conclusive at Quarter Sessions—Duty of Quarter Sessions—Breach to be Proved if not Admitted—Procedure—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 6 (3) (4).

By section 6 (3) of the Criminal Justice Act, 1948: "If it is proved to the satisfaction of the court before which a probationer appears or is brought under this section that the probationer has failed to comply with any of the requirements of the probation order, the court may . . . (*b*) if the probation order was made by a court of assize or quarter sessions, commit him to custody or release him on bail (with or without sureties) until he can be brought or appear before the court of assize or quarter sessions." By section 6 (4): "Where the court of summary jurisdiction deals with the case as provided in paragraph (*b*) of the last foregoing subsection, then—(*a*) the court shall send to the court of assize or quarter sessions a certificate signed by a justice of the peace, certifying that the probationer has failed to comply with such of the requirements of the probation order as may be specified in the certificate, together with such other particulars of the case as may be desirable, and a certificate purporting to be so signed shall be admissible as

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evidence of the failure before the court of assize or quarter sessions; and (*b*) where the probationer is brought or appears before the court of assize or quarter sessions, and it is proved to the satisfaction of that court that he has failed to comply with any of the requirements of the probation order, that court may deal with him, for the offence in respect of which the probation order was made, in any manner in which the court could deal with him if he had just been convicted before that court of that offence."

The certificate given by the justice under subsection (4) is admissible, but not conclusive, evidence at quarter sessions. In the absence of any admission of the actual breach by the defendant, quarter sessions are entitled to treat the matter as if it were an appeal from the magistrates and should hear further evidence, and then form their own conclusion. The defendant may be asked to say whether he admits the alleged breach or not; he should first be told where he was originally convicted and what happened to him, and he should then be told precisely how the breach is alleged to have taken place, and asked whether he admits all those facts. He must be asked whether he admits the actual breach alleged, and it is not sufficient to ask him whether he admits that there has been a finding of a magistrates' court to that effect. If he does not admit the original conviction and probation order and the alleged breach, these matters must be strictly proved at quarter sessions.

Devine (1956) 40 Cr.App.R. 45; [1956] 1 W.L.R. 236 applied.

Appeal against sentence.

The appellants were convicted at Andover Quarter Sessions on February 6, 1958, of larceny and were put on probation by the Recorder (E. S. Fay, Esq., Q.C.) for three years. In July 1958 they were convicted at a magistrates' court and brought back before the Recorder who on July 15, 1958, made a new probation order for three years with a condition that they should not associate with each other. On October 15 the appellant Chapman, and on October 22, 1959, the appellant Pidgley were brought before different magistrates' courts, each of which adjudged that the appellants had committed breaches of the last probation order by having associated with each other. They were committed to Andover Quarter Sessions and on October 27, 1959, the Recorder sentenced each of the appellants to twelve months' imprisonment.

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At quarter sessions the original offences were put to the appellants and it was also put to them that the respective magistrates' courts had found that they were in breach of the probation order by associating with each other. These facts they admitted. They were not asked whether they admitted that they had in fact associated. The Recorder took the view that it was impossible for him to go behind the findings of the magistrates' courts and treated the justices' certificates as conclusive evidence of the alleged breach of probation in the case of each of the appellants.

F. H. L. Petre, for the appellants. The Recorder was wrong in treating the justices' certificates as conclusive evidence that there had been breaches of probation by the appellants. Section 6 (4) of the Criminal Justice Act, 1948, merely says that such a certificate shall be " admissible in evidence " at quarter sessions and section 6 (4) (*b*) envisages that certain matters must be proved at quarter sessions. In the absence of any admission by the appellants that they had actually committed the breaches of the probation order which were alleged, the Recorder should have heard evidence on this issue and satisfied himself that in each case the breach had been properly proved. He should have given the appellants the opportunity of contesting this issue, as they wished to do; and that was all the more important in this case, because when he made the probation order in July 1958, the Recorder had made it clear to the appellants that he would not regard casual, as contrasted with deliberate, association as constituting a breach of the order and the appellants' case was that their association had been only of a casual and unpremeditated nature.

Martin Tucker, for the Crown. The justices' certificates constituted at least prima facie evidence that there had been breaches of the probation order, and in the absence of any evidence to the contrary the Recorder would have been entitled to act on them. It may be that he was acting under the impression that the appellants had admitted the actual

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breaches alleged, and not merely the fact that the magistrates' courts had found the breaches proved. If the actual breaches had been admitted by the appellants, there would have been no need of further proof. It does, however, appear that the appellants were never asked whether they admitted the actual breaches alleged, and it is submitted that in those circumstances the court might think it proper to treat the proceedings before the Recorder in October 1959 as a nullity, and remit the case to the Recorder to hear evidence on the issue whether the alleged breaches had been proved or not and deal with the matter according to whether he found the breaches proved or not.

THE LORD CHIEF JUSTICE: These appellants were convicted at Andover Borough Quarter Sessions on February 6, 1958, of larceny of a handbag and contents, and were put on probation for three years. In July 1958 they were convicted at a magistrates' court of loitering with intent to steal, and one of them, Pidgley, also of larceny, and as a result they were brought before quarter sessions. The Recorder on July 15, 1958, then made a new probation order for three years with a condition that they should not associate with each other. It is only right to say that when he did that he told them that, if they met by chance, they were not prohibited from conversing and what he was dealing with was true association. On October 15, 1959, Chapman, and on October 22, 1959, Pidgley, were brought before magistrates' courts and those courts adjudged that each of them had been in breach of that last probation order in that they had associated. Having done that, they remanded the probationers to quarter sessions. On October 27 the matter came before the Recorder at Andover Quarter Sessions again, when he sentenced each of them to twelve months' imprisonment.

What happened before the quarter sessions was that the original offences were put to the prisoners and it was also put to them that in Pidgley's case the Ringwood Magistrates' Court and, in Chapman's case, the Salisbury and Amesbury

Magistrates' Court had found that they were in breach of the probation order by associating with each other, and they admitted that those magistrates' courts had so found. They were never asked in fact whether they admitted that they had associated, and it is clear that their case throughout has been and still is that they never did associate in the true sense of the word, but they had in fact met accidentally and were conversing, a matter which, as I have said, the Recorder originally told them would not constitute a breach of probation. Not only were they not asked whether they had associated, but quite plainly from the transcript the Recorder took the view that it was impossible for him to go behind the findings of the two magistrates' courts; in other words, he was treating the findings of the magistrates' courts as conclusive and treating the matter as having been committed to him for sentence.

The question in this case is whether the procedure adopted by the learned Recorder was right, and that depends on the true construction of section 6 of the Criminal Justice Act, 1948. By subsection (3) it is provided: " If it is proved to the satisfaction of the court before which a probationer appears or is brought under this section that the probationer has failed to comply with any of the requirements of the probation order, that court may without prejudice to the continuance of the probation order, impose on him a fine not exceeding ten pounds " . . . " or may . . . (*b*) if the probation order was made by a court of assize or quarter sessions, commit him to custody or release him on bail (with or without sureties) until he can be brought or appear before the court of assize or quarter sessions." Pausing there, both magistrates' courts in this case had it proved to their satisfaction that each probationer had failed to comply with the requirements of the probation order. They did not exercise their right to fine the probationers, but they then remanded them to quarter sessions under paragraph (*b*). Subsection (4) goes on " Where the court of summary jurisdiction deals with the case as provided in paragraph (*b*) of the last foregoing subsection then—(*a*)

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the court shall send to the court of assize or quarter sessions a certificate signed by a justice of the peace, certifying that the probationer has failed to comply with such of the requirements of the probation order as may be specified in the certificate, together with such other particulars of the case as may be desirable; and a certificate purporting to be so signed shall be admissible as evidence of the failure before the court of assize or quarter sessions; and (*b*) where the probationer is brought or appears before the court of assize or quarter sessions, and it is proved to the satisfaction of that court that he has failed to comply with any of the requirements of the probation order, that court may deal with him, for the offence in respect of which the probation order was made, in any manner in which the court could deal with him if he had just been convicted before that court of that offence."

The real question here is whether the certificate which has to be sent forward by the magistrates' court when this procedure is adopted is conclusive so that quarter sessions cannot go behind it. In the judgment of this court, it is not conclusive. It is not said to be conclusive, but merely admissible. Further, by paragraph (*b*) of subsection (4) it is the court of quarter sessions that has to be satisfied that he has failed to comply with the requirements. It is suggested that they can be satisfied that the requirements of the probation order have not been fulfilled by looking at the certificate and the certificate alone, but as a matter of construction, that is clearly wrong, because paragraph (*b*) is in the form "where the probationer is brought or appears before the court of assize or quarter sessions, and it is proved to the satisfaction of that court." Paragraph (*a*) has already provided that where the probationer is to appear before quarter sessions there has to be a certificate, and yet the paragraph goes on to say that quarter sessions must be satisfied. It is clear from the framework of subsection (4) taken as a whole that Parliament never intended that the certificate of the justices should be final and conclusive. Indeed, looking at the matter from a rather broader angle, if that were right, and the certificate is

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conclusive, then it would follow that there was no machinery in the nature of appeal from a finding of the magistrate that there had been a breach of probation. It seems to this court that under paragraph (*b*), while the certificate is admissible, it is for the court of quarter sessions to be satisfied, and for that purpose they can treat the matter as if it was an appeal from the magistrates, hear further evidence and come to their own conclusion in the matter.

It follows that in such a case as this the procedure laid down in DEVINE's case (1956) 40 Cr.App.R. 45; [1956] 1 W.L.R. 236 is applicable. It is true that DEVINE's case (*supra*) was dealing with a case of a probationer being brought before the court that had originally sentenced him; in other words it was not a question of going to magistrates first, but this court there laid down the proper procedure as this: "Where a person is brought before the court for breach of a probation order, the breach alleged should be put to him in the clearest possible terms and he should be asked to say whether he admits it or not. The terms in which the matter should be put to him are: first of all, he should be told where he was originally convicted and what happened to him; then he should be told how the breach is alleged to have taken place, and if it be by a further conviction, the occasion of that conviction and the adjudication of the court should also be mentioned; then he should be asked to say whether he admits those facts. If he does, the court can then proceed to deal with him. If he does not, then a trial will take place, albeit without a jury, and he will have to be asked whether he desires to give evidence or call witnesses, and the court will have to pronounce whether it finds that the breach of the probation order has been proved; but it is desirable that the proceedings should begin by the matter being put clearly to him and his being asked whether he admits the breach."

It seems to this court that that procedure is equally applicable to such a case as the present where the matter has been in the first instance before a magistrates' court. It

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follows that in this case there has been a mis-trial at quarter sessions from the outset. It is just as if a trial proceeded without prisoners being asked to plead, and in those circumstances it seems to this court that the proceeding was a nullity, and it would be open to this court to send the matter back for a re-trial. It is to be observed, however, that these appellants have already been in prison since October 27, 1959, and, having regard to the nature of the alleged breach, the court feels that justice would be done in this case if they merely quashed the sentence and did not send the matter back to quarter sessions. Accordingly, the appellants are now discharged.

Sentence quashed.

Solicitors: Woodford & Ackroyd, Southampton, for the Crown.

PRACTICE POINT (DIVISIONAL COURT)

BEFORE

THE LORD CHIEF JUSTICE OF ENGLAND AND
MR. JUSTICE DONOVAN

1960
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STATEMENT IN REGARD TO APPLICATIONS FOR HABEAS CORPUS BY PRISONERS

THE LORD CHIEF JUSTICE: The court has considered these two applications made by prisoners in person (Albert Samuel John Cook and Bryan John Wring) for habeas corpus. The court is quite clear that there is nothing in the grounds raised which would enable this court to make the order.

The court would like to take this opportunity of setting out the position in regard to these applications. The Divisional Court of the Queen's Bench Division has repeatedly stated that habeas corpus is not to be regarded as a means of appeal

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against conviction or sentence. As the court stated in FEATHERSTONE (1953) 37 Cr.App.R. 146, at p. 147: "The court does not grant, and cannot grant, writs of habeas corpus to persons who are in execution, that is to say, persons who are serving sentences passed by courts of competent jurisdiction. Probably the only case in which the court would grant habeas corpus would be if it were satisfied that the prisoner was being held after the term of the sentence passed on him had expired." Accordingly, a prisoner who wishes to challenge either his conviction or his sentence, should apply to the Court of Criminal Appeal or to quarter sessions, as the case may be. If the prisoner nonetheless persists in his desire to apply for habeas corpus, the courses open to him are: (a) to consult a solicitor about the possibility of instructing counsel to make an application on his behalf, or (b) to ask someone to make an application for him or arrange for one to be made, and in either case to swear the necessary affidavit; or (c) to apply to the local committee of the Law Society for legal aid for the purpose of making an application.

There is no right of access to the Divisional Court otherwise than by the means described above. As a concession, however, the court is prepared to consider any written statement by the prisoner setting out the grounds on which he considers that he is unlawfully detained and sent by letter to the Master of the Crown Office. This is not an application, since it is not in accordance with the Supreme Court Rules, but the Divisional Court (or in vacation the vacation judge) does as a matter of practice consider the letter and statement in order to see whether the prisoner has an arguable point. If he has, the court arranges for the Official Solicitor to instruct counsel to make a formal application under the rules on the prisoner's behalf. If the court is of opinion that there is no arguable point, the prisoner is informed that the court sees no reason to depart from the formal procedure, leaving it to the prisoner to proceed in accordance with the rules. Prisoners will not be permitted to make such an informal approach more than once.

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The Divisional Court has ruled that no applicant for a writ of habeas corpus can be heard in person unless some exceptional ground is shown for departure from the established practice. Compare: *Re* GREENE (1941) 57 T.L.R. 533. A prisoner, therefore, is not produced for the purpose of making an application in person unless the court so directs.

[IN THE HOUSE OF LORDS]

BEFORE

LORD RADCLIFFE, LORD TUCKER,
LORD KEITH OF AVONHOLM, LORD DENNING
AND LORD MORRIS OF BORTH-Y-GEST

1960
Feb. 22, 23, 24, 25;
March 24

WELHAM *v.* DIRECTOR OF PUBLIC PROSECUTIONS

Forgery—Intent to Defraud—Intention to Cause Another to Act to his Detriment or Prejudice—No Intention to Cause Pecuniary or Economic Loss—Forgery Act, 1913 (3 & 4 *Geo.* 5, *c.* 27), *ss.* 1 (1), 5 (1) (2).

Section 4 (1) of the Forgery Act, 1913, only restates the requirements of the common law of forgery. The "intent to defraud" mentioned in that subsection and in other places in that Act is the same intent as was required by common law, and means an intent to practise a fraud on someone or other, it being sufficient if anyone may be prejudiced by the fraud. If, therefore, there is an intention to deprive another person of a right or to cause him to act in any way to his detriment or prejudice or contrary to what would otherwise be his duty, an intent to defraud is established, notwithstanding that there is no intention to cause pecuniary or economic loss.

TOSHACK (1849) 4 Cox 38, BASSEY (1931) 22 Cr.App.R. 160 and dicta of Lord Tucker in BOARD OF TRADE *v.* OWEN AND SETH-SMITH, 41 Cr.App.R. 11, at p. 40; [1957] A.C. 602, at p. 622, followed.

Dicta of Buckley J. in *Re* LONDON & GLOBE FINANCE CORPN. [1903] 1 Ch. 728, at p. 732, explained.

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Appeal by the prisoner from order of the Court of Criminal Appeal dismissing his appeal against conviction.

The appellant, Robert John Welham, was convicted at the Central Criminal Court on December 19, 1958, of uttering forged documents with intent to defraud and was sentenced by the Common Serjeant to nine months' imprisonment. He appealed to the Court of Criminal Appeal against conviction.

The following statement of facts is taken from the judgment of the Court of Criminal Appeal.

The appellant was at all material times the sales manager of a company known as Motors (Brighton), Ltd., which carried on business in Brighton in motor lorries. One Prater was a director and the secretary of the company. Prater was also a director and the secretary of a company known as Pacca, Ltd., which carried on business in London in furniture. One Goodman was also a director of Pacca, Ltd. In connection with the business of Pacca, Ltd., Prater had dealings with two hire-purchase finance companies, Consortium Finance, Ltd., and Masterton Finance and Trading Services., Ltd. (hereinafter called the " finance companies "). Between May 1956 and July 1957 the finance companies advanced very large sums of money to the Brighton company and the London company on hire-purchase agreements and credit sale agreements which had been witnessed by either the appellant or Goodman and which, it is said, were forgeries.

The appellant, Prater and Goodman were all tried at the Central Criminal Court before the Common Serjeant on an indictment containing six counts charging conspiracy to defraud the finance companies and also uttering forged documents with intent to defraud. Goodman pleaded guilty to count 1, the conspiracy charge, and to counts 4, 5 and 6, charging him with uttering false documents with intent to defraud upon which Pacca, Ltd., had obtained advances. Prater was found guilty on all counts. The appellant, though acquitted on count 1, was found guilty on counts 2 and 3, charging him with uttering forged documents with intent to defraud upon which Motors (Brighton), Ltd., had obtained advances. There was no evidence against him on counts 4, 5 and 6, and the jury were directed to and did acquit him on those counts. It was against his conviction on counts 2 and 3 that he appealed by leave of the court.

His defence was that there was no intent to defraud the finance companies. He said that Prater had told him that the finance companies had money lying idle which they were anxious to lend; that they could not do so because of the current credit restrictions; but that they were prepared to do so, if they could have documents which would make it appear to anyone inspecting their records that they were advancing money in the way of their business as finance companies. Prater, he said, had informed him that this was further necessary because under their memorandum and articles the finance companies could not act as money-lenders. The appellant said that he believed Prater and, accordingly, that he had no intention to defraud the finance companies, but was merely uttering forged documents in order, as it was said, to pull wool over the eyes of anyone who might inspect the records of the companies in order to see that the credit restrictions were being observed.

The appeal was heard by the Court of Criminal Appeal—The Lord Chief Justice, Hilbery, Cassels, Salmon and Edmund Davies JJ.—on December 16, 1959, and on December 21, 1959, the judgment of the court dismissing the appeal was delivered by

HILBERY J. [after stating the facts]: The Common Serjeant properly directed the jury that, if they thought that the appellant's story might well be true, they should acquit him on count 1, since the conspiracy alleged was a conspiracy to defraud the finance companies and no one else. The jury, as already indicated, apparently took this view and acquitted the appellant on count 1. The Common Serjeant went on to say to the jury that the matter did not end there, since under counts 2 and 3 it was not necessary to allege an intent to defraud any particular person and they did not do so.

He directed the jury that if they were satisfied that the appellant knew that the documents, the subject of these counts, were false, then on his own story he was guilty of the offences alleged in those counts. Thus, at page 31 of the summing-up he said: "It is not incumbent upon the prosecution in these two counts, as it is in the case of the first count, to prove an intent to defraud any particular person, and, therefore, if the prosecution have succeeded in proving against Welham that he was a party to putting forward documents which he knew to be forged, and he put them forward with the dishonest intention, as he himself said, of defrauding the Capital Issues Committee, well, then he would be guilty upon these two counts." Again, later he said: "They have got to prove an intent to defraud, and Welham's own case is that the intention here in respect of these bogus documents was to defraud the Capital Issues Committee by deceiving them in not preventing something which it was their duty in law to prevent, namely, the advancing of large sums of money over a certain limit which was provided by law at the time." Finally, after the jury had retired and had returned into court to put a question, the Common Serjeant gave them a further direction to the same effect.

It is true that the appellant's story was that he thought he was being a party to deceiving the Capital Issues Committee, whereas the person who might inspect the companies' books would be an inspector of the Board of Trade, but provided that there was an intent to defraud someone, it matters not who would be defrauded. It was in these circumstances that the jury returned a verdict of Guilty on counts 2 and 3, and the sole question in this appeal is whether the Common Serjeant's direction was right in law in saying that the appellant's story amounted to an admission of an intent to defraud. If it amounted merely to an intention to deceive, then, since the offences charged were offences of uttering forged documents and the essential ingredient of the offences against the Forgery Act, 1913, is an intent to defraud, the direction was wrong.

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The classic definition of intent to defraud is that laid down by Buckley J. (as he then was) in *Re* LONDON AND GLOBE FINANCE CORPORATION [1903] 1 Ch. 728. At p. 732 he said: "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action." That passage has been quoted and approved many times by this court. No doubt, the last sentence beginning with the words "more tersely put" must be read with reference to what has gone before and was not intended to enlarge the definition. The course of action induced by deceit must clearly be a course of action which involves some real deprivation or injury. But it is said here that the true definition and that intended to be laid down by this passage ends with the words: "To defraud is to deprive by deceit." It is said that the essential element in an intent to defraud is an intent to deprive the person deceived of something of value, whether money or a chattel, and thus the causing of some economic loss. This view is well stated by the editor of *Russell on Crime* (11th ed., 1958) at pp. 1428–1430 and is adopted by Professor Glanville Williams in his *Criminal Law* at pp. 76–77.

We have, however, come to the conclusion that this is too narrow a view. While, no doubt, in most cases of an intention to defraud the intention is to cause an economic loss, there is no reason to introduce any such limitation. Provided that the intention is to cause the person deceived to act to his real detriment, it matters not that he suffers no economic loss. It is sufficient if the intention is to deprive him of a right or to induce him to do something contrary to what it would have been his duty to do, had he not been deceived. Moreover, to hold otherwise would, we think, involve holding that at least one case, BASSEY (1931) 22 Cr.App.R. 160, was wrongly decided and that the observations of Lord Tucker in his speech in

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the House of Lords in BOARD OF TRADE *v.* OWEN AND SETH-SMITH (1956) 41 Cr.App.R. 11, at p. 40; [1957] A.C. 602, at p. 622 were misconceived.

Thus in BASSEY'S case (*supra*) the appellant had produced false documents to the Benchers of the Inner Temple in order to obtain his admission as a student to the Inn. It was argued that, at most, he intended to deceive and that the Benchers by admitting him were not being deprived of anything. Swift J., however, in giving the judgment of the court, said at p. 162: "In this case there was, in the opinion of this court, evidence on which the jury might properly say that, in making these forged documents and in subsequently uttering them, the appellant intended to defraud, because he intended to induce the Benchers to act to their injury in admitting as a student a person whom, if they had known the true facts, it was not only their right, but also their duty, to exclude." There was thus no question of the Benchers being deprived of anything which involved economic loss and if the present appellant's argument is right, that case was wrongly decided.

In BOARD OF TRADE *v.* OWEN AND SETH-SMITH (*supra*) the point decided was that no indictment for conspiracy to obtain a lawful result by unlawful means would lie in England, where the unlawful means and the ultimate object were both outside the jurisdiction. Count 3, however, charged the defendants with conspiracy to defraud a government department in Germany by causing that department to grant export licences. In dealing with that matter, Lord Goddard in this court, after referring to Buckley J.'s definition, said (41 Cr.App.R. at p. 15; [1957] A.C. at p. 434): "It may well be doubted whether a government department can be said to act to its injury merely by issuing a certificate which it would not have granted had the true facts been known. Certainly it has not been deprived of anything. It is, however, unnecessary to decide this point because of the view the court has formed on the main question raised by the certificate of appeal granted by the learned judge." On appeal, however, to the House of Lords, BASSEY'S case (*supra*) was relied on in argument (41

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Cr.App.R. at p. 29; [1957] A.C. at p. 609), Lord Tucker said (41 Cr.App.R. at p. 40; [1957] A.C. at p. 622): " If, however, a conspiracy of this nature is aptly included in the wide category of conspiracies known as conspiracies to cheat and defraud, and if it is necessary to aver and prove that the acts designed to be done or the object to be achieved will result in some person acting to his detriment, I feel little doubt that a government department so acts if it issues a licence which enables something to be done which the department is charged with the duty to prevent." Both by his reasoning and by the very words he used, Lord Tucker in that passage is, we think, clearly giving tacit approval to the decision in BASSEY's case (*supra*). It is true that this passage in Lord Tucker's speech can be said to be *obiter*, but it is to be observed that all their Lordships were content to approve what he said without qualification. It has been urged that Lord Tucker's observations can be justified on the ground that in that case the person deceived was induced to part with something, namely, the piece of paper by which the licence was granted and that that licence was, at any rate in the hands of the deceiver, of economic value. Not only, however, was that not the ground on which Lord Tucker made his observations, but it would, in our opinion, have been a highly artificial ground. It would have been absurd if a different conclusion were necessitated had the licence granted been an oral licence.

Reference may also be made to R. *v.* POTTER (1958) 42 Cr.App.R. 168 a decision of Paull J. on assize. False documents had in that case been put forward with the intention of inducing a county council to issue a driving licence. At p. 174 the learned judge said: " It was to induce the county council to take a course of action which they would not otherwise have taken and which it was not only their right, but their duty, not to take if they had known the true facts." It is true that he went on to say that the intent to defraud could be justified on another ground, namely, an intention to cause the county council to part with a chattel, that is, the piece of paper on which the licence was printed, but in our judgment the first ground given by him was the correct one.

It is further to be observed that in the earlier editions of the textbooks no suggestion is to be found of the need for an economic loss. Thus, there is no suggestion of this in the earlier editions of *Russell on Crime*. In the 13th edition (1929) of *Kenny on Outlines of the Criminal Law*, the last edition by that author, it is specifically stated at p. 263 that pecuniary detriment is unnecessary. To the same effect is the 15th edition (1936) by Mr. Godfrey Phillips at p. 303. It is further to be observed that in Stephen's *History of the Criminal Law of England*, Vol. 2, at p. 121, the following definition is given: "I shall not attempt to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy." There is no suggestion there that the injury must take the form of an economic loss. Moreover, as there stated, "a risk of possible injury" is enough.

This view is further supported by a reference to the old cases decided before forgery was made a statutory offence, since at common law forgery was the making of a false document with intent to defraud. Thus, in TOSHACK (1849) 4 Cox C.C. 38, the Court of Criminal Appeal decided that counts alleging that the defendant had uttered forged documents with intent to induce the Corporation of Trinity House to issue to him a master's certificate were good counts for forgery at common law. It is true that the indictment set out that the pieces of paper upon which certificates were granted were of the value of one penny each, but at p. 41 Alderson B. in delivering the judgment of the court, did not proceed upon that basis but on the following ground (at p. 41): "It is a very important public duty which the Trinity House have to discharge, important to owners of property of this description, and important to the lives of those entrusted to their care; and if insufficient seamen or persons otherwise than of good character and conduct are appointed, the unfortunate subordinates of the ship are often subjected to harsh and improper treatment." It is further to be observed that Erle J. in HODGSON (1856) 1 Dears. & B. 3 read the judgment of Alderson B. in the same way. Thus, at p. 5 he said in reference to TOSHACK (*supra*): "This seems very analogous to forging the certificate in that case. The prisoner used the diploma in his endeavours to get appointed to the poor house. If an incompetent man were appointed to such a situation, in consequence of his appearing to have this qualification, a large class of persons might suffer. I do not see any great distinction between the danger of loss of life at sea through the employment of an incompetent pilot, and the danger of loss of life on land through the employment of an incompetent surgeon."

Perhaps the strongest argument in favour of the view that the intention must be an intention to cause some economic loss is that otherwise there is for practical purposes little distinction between an intent to defraud and an intent to deceive. Yet the Forgery Act, 1913, in subsections (1) and (2) of section 4 clearly draws such a distinction. While, however, there may be in practice few occasions when a false document is not uttered with intent to defraud, there may well be cases in which the only intent is an intent to deceive. HODGSON's case (*supra*) is a good example of that. In that case the defendant had forged a diploma of the College of Surgeons and hung it up in his sitting-room. At the time when he did so he had no intent to cause anyone to act on it, but only to induce those that might come to his room to believe that it was genuine. In those circumstances it was held that there was not intent to defraud and accordingly the conviction for forgery was quashed.

Turning now to the facts of this case, the admitted intent of the appellant was by deceit to induce such person as was charged with the duty of seeing that the credit restrictions were observed to act in a way in which he would not act if he knew the true facts. This the appellant was doing in order that he might benefit by getting further loans. In the judgment of this court, the appellant was intending by deceit to induce the person deceived to act to his detriment and thus was intending to defraud. Indeed, on the facts of the present case it could be said that the appellant was intending by deceit to deprive the person deceived of the opportunity of exercising a right, namely, a right to prosecute for breach of the credit restrictions, thus depriving the community of the protection afforded by them.

Accordingly, this appeal is dismissed.

The appellant appealed, under certificate granted by the Att.-Gen. pursuant to section 1 (6) of the Criminal Appeal Act, 1907, to the House of Lords.

Gerald Gardiner, Q.C., for the appellant. The issue raised by the appeal is the meaning of " intent to defraud " in section 4 (1) of the Forgery Act, 1913. It is submitted on behalf of the appellant that " intent to defraud " means an intent to deprive the person to whom the document in question is uttered of some valuable thing. Section 1 of the Act draws a distinction between the intents necessary to constitute the offence of forgery in the case of different kind of documents; there must be an intent to defraud in the case of a public document, whereas intent to deceive is sufficient in the case of a private document. There must be a difference between the two intents. " Intent to deceive " *simpliciter* was introduced into the criminal law for the first time by the Forgery Act, 1913. In the present case, the appellant had an intent to deceive only, his whole object being to evade the existing restrictions on hire-purchase transactions. It was most essential, therefore, that there should have been a careful direction on the difference between intent to deceive and intent to defraud. The distinction is that to defraud means to deprive of some valuable thing, that is to say, that the deceit must have been *lucri causa.* That would be in accordance with the ordinary interpretation of ordinary language. If one defines "intent to defraud" as intent merely to cause someone to act to his injury or detriment, the difference between the two intents disappears. In CROWTHER (1832) 5 C. & P. 316 the intent was to deprive of a valuable thing, the person to be defrauded was the person to whom the document was uttered, and the indictment was, therefore, rightly held to be good. The same principle was held to apply in MARTIN (1836) 1 Moo. 483; HOATSON (1847) 2 C. & K. 777; HAYWARD (1846) 2 Cox 372 and WILSON (1847) 1 Den. 284, though it is now clear that there need not be an intent to defraud any specific person.

No doubt, it will be contended for the Crown that in TOSHACK (1849) 4 Cox 38 a wider view was taken. The report is somewhat incomplete and the distinction between deceit and fraud does not appear to have been much regarded, though reference is made to "causing great damage" and to "injury." It is conceded that there may be an intent to defraud, although there was no chance of it succeeding: HODGSON (1856) Dears. & B. 3. All the early indictments, however, make it clear that it was not a mere deceit that was alleged and that the convictions were founded on intent to defraud. [He referred also to MOAH (1858) 7 Cox 503.] In the well-known definition of Buckley J. in *Re* LONDON AND GLOBE FINANCE CORPORATION (1903) 1 Ch. 728, at p. 732, regard was not had to the more subtle distinctions between "deceive" and "defraud." The facts there plainly showed fraud and precise distinction was not necessary. Moreover, what was said by the learned judge was strictly *obiter*, and certainly was not intended to lay down the principle that in the future it was unnecessary for criminal courts to define the difference between "deceive" and "defraud." If the proper construction of "intent to defraud" were to be held to be an intent to cause any other person to act to his injury or detriment, a very wide door would be opened without the limits being in any way clear. On that construction even a bogus letter written to another

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person urging him to keep a fictitious appointment would be forgery with intent to defraud. East, *Pleas of the Crown*, Vol. II, p. 852, clearly distinguishes deceit and fraud. The observations of the courts in CARPENTER (1911) 22 Cox 618; BENNETT & NEWTON (1913) 9 Cr.App.R. 146 are not necessarily applicable to the present case though it must be conceded that in the latter case Buckley J.'s definition was cited with approval. It was again cited with approval in BASSEY (1931) 22 Cr.App.R. 160 and in the speech of Lord Tucker in BOARD OF TRADE *v.* OWEN & SETH-SMITH, 41 Cr.App.R. 11; [1957] A.C. 502. No doubt, the Crown will rely strongly on these decisions, although TOSHACK (*supra*) does not appear to have been cited in either of them, and TOSHACK (*supra*) may properly be regarded as a case of intent to cause a person to act to his economic disadvantage. Some of the earlier decisions which may at first sight appear to support the Crown's contention may be explained on the grounds that the documents forged were documents of a public nature. It is submitted that there was no previous authority for the extended meaning given to " intent to defraud " in BASSEY (*supra*). R. *v.* POTTER (1958) 42 Cr.App.R. 168; [1958] 1 W.L.R. 638 contains observations which support the Crown's contentions, but in that case there was evidence of intent to cause economic loss, and Paull J. based his decision at least in part on that fact. [He referred also to WINES 37 Cr.App.R. 197; [1954] 1 W.L.R. 64.] Different textbook writers have taken different views on the meaning of " intent to defraud." The view contended for on behalf of the appellant is supported by *Russell on Crime*, 11th ed. (1958) pp. 1428–1430, and Glanville Williams' *Criminal Law*, pp. 76–77.

E. W. G. Ross-Munro following for the appellant. On all the authorities with the exception of BASSEY (*supra*) the person who was deceived in fact acted to his injury by parting with something. In BOARD OF TRADE *v.* OWEN & SETH-SMITH (*supra*) the government department parted with a licence and in R. *v.* POTTER (*supra*) with a driving licence. Here it is clear that there was no idea of causing economic loss present to the appellant's mind.

The Solicitor-General (*Sir Jocelyn Simon*, Q.C.) for the Crown. If the words "intent to defraud" have been judicially interpreted and re-enacted, they should be construed in the sense in which they have already been interpreted. All the earlier textbook writers interpreted "intent to defraud" as intent to act to the prejudice of another man's right, and the first suggestion of economic detriment appears in Mr. Cecil Turner's *Criminal Law*, the writer of which is still alive. Many of the decided cases have given a wider interpretation than intent to cause economic loss, and the man in the street would certainly not so limit the word "defraud." So far as statute law is concerned, there was no attempt to define forgery before the Forgery Act, 1913. The Forgery Act, 1803 (rep.), used the phrase "intent to defraud or deceive" in relation to the forgery of bills of exchange, etc., but until 1913 the intent to deceive was not introduced into any other Forgery Act, although the phrase "intent to deceive or defraud" occurred in statutes dealing with offences akin to forgery, *e.g.*, section 84 of the Larceny Act, 1861, and section 166 of the Companies Act, 1862 (rep.). Some of the statutes which used the phrase "intent to defraud" related to public documents and some to private documents. So far back as 1727 WARD 2 Str. 747; 2 Ld.Raym. 1461, decided that the altering of any wording whereby another was prejudiced amounted to forgery. At common law intent to defraud applied to both public and private documents, and in spite of later distinctions between public and private documents, the common law appears to have drawn no such distinction. A distinction was drawn between writings of importance and writings of an inferior nature, which for some time were not considered to be the subject of forgery. At common law it was sufficient if there was the intent to prejudice another person's right and nothing of an intent to cause pecuniary loss was required. Section 4 (1) of the Forgery Act, 1913, re-enacted the common law, and the statute provides that there need not be any intention to defraud any particular person or class of persons. WARD'S case (*supra*) was followed in PARKES & BROWN (1797) 2 Leach 776 and its principles were accepted in East's *Pleas of the Crown* (1803) Vol. 2, p. 852. In FAWCETT (1793) 2 East P.C. 862 and HARRIS (1833) 1 Moo. 393 forgeries of documents relating to the release of prisoners were held to have involved an intent to defraud, although there was no question of economic loss. The same principle applied in MARTIN (1836) 1 Moo. 483 where the intent was to deprive the person alleged to have been defrauded of his opportunity of prosecuting. In TOSHACK (1849) 4 Cox 38, where, according to the report, there was an " intent to deceive and defraud " the *ratio decidendi* was not that the Masters of Trinity House had been deprived of a piece of paper (to which consideration the maxim *de minimis non curat lex* would have applied), but that there was an intent to deprive them of the right of acting in accordance with the public duty which they had to discharge to the community. The dictum of Buckley J. in *Re* LONDON & GLOBE FINANCE CORPORATION [1903] 1 Ch. 728, at p. 732, was *obiter* and not intended to be a full explanation of " intent to defraud " in criminal law. The Crown do not seek to dispute the definition of " deceive " therein contained. BASSEY (*supra*) was correctly decided, because there was an intention to deprive the Benchers of the Inn of the right of exercising their duty to exclude in a proper case, and that decision was accepted by this House as being correct in BOARD OF TRADE *v.* OWEN & SETH-SMITH (*supra*). In the Forgery Act, 1913, the legislature intended the phrase " intent to defraud " to be understood in the sense in which it had been understood at common law, that is to say, to cause detriment to another person's rights and not necessarily to cause pecuniary, proprietary or economic loss.

J. H. Buzzard following for the Crown. " Intent to defraud " is a term of art at common law and where Parliament uses it in a statute it must be presumed to bear the same meaning as at common law. An intent to deceive is not an essential ingredient in an intent to defraud. In *Re* LONDON

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AND GLOBE FINANCE CORPORATION [1903] 1 Ch. 728 Buckley J. was dealing with a case where false representations were made in documents and therefore, upon the facts of that case, deceit was implicit. *Non constat* that deceit is a necessary ingredient in an intent to defraud. This is made plain by reference to the Larceny Act, 1861, with which Buckley J. was dealing. In his dictum at p. 732 he was referring, *inter alia*, to sections 83 and 84 of the Larceny Act, 1861, which require an " intent to defraud " and an " intent to deceive or defraud " respectively. However, section 80 of that Act deals with conversion by a trustee " with intent to defraud." It is clear that the receipt of the property by the trustee may be innocent and that the intent to defraud existing at the moment of conversion is only formed after receipt of the property. In such a case there is no deceit involved in the commission of the crime and therefore deceit is not of the essence of an intent to defraud. " Fraudulently " and " with intent to defraud " mean the same thing at common law and both mean " dishonestly." " Fraudulently " is lifted straight from Justinian; see 2 East. P.C. 553. In nine cases out of ten it is sufficient to direct a jury that " fraudulently " or " with intent to defraud " mean " dishonestly." The counts for uttering in this case were put in the indictment expressly for the purpose of anticipating the very defence which was in fact raised by the appellant.

M. D. L. Worsley also appeared as counsel for the Crown.
Gerald Gardiner, Q.C., replied.

The House took time for consideration.

March 24. The following opinions were delivered:

LORD RADCLIFFE—My Lords, I have had the opportunity of reading in advance the opinion that will be delivered by my noble and learned friend, Lord Denning. I agree with what he says and I share his view that this appeal must be dismissed. I propose, therefore, to confine what I say to expressing my opinion upon the central question of law involved, the question which has been the cause of the case reaching this House.

What is the meaning of the words "intent to defraud" which occur in section 1 and, more particularly, in section 4 (1) of the Forgery Act, 1913? In my opinion, an answer cannot be supplied to that question which does not regard both the context of the Act in which they appear and the previous history of legal decisions as to the meaning of the word "defraud" when used as an element of the crime of forgery. There are, accordingly, two preliminary considerations which commend themselves as being material to this approach.

The first is that the Act itself recognises that there may be at least a significant difference between an intent to defraud and an intent to deceive. For whereas most of the offences for which punishment is prescribed are punishable whether done with intent to deceive or intent to defraud, some acts of forgery can be a crime only if done with intent to defraud (see section 2 (1) and (2) and section 4 (1)). Up till the date of this Act forgery statutes, of which there had been innumerable instances over the preceding 500 years, while often (though not by any means consistently) defining the offence explicitly in terms of "intent to defraud," had hardly ever used the phrase "intent to deceive" in connection with it. The first and only occasion on which this occurred, so far as the researches of the learned Solicitor-General have taken us, was in the Forgery Act, 1803 (43 Geo. III, c. 139), which by section 1 dealt with the crime of forging bills of exchange, promissory notes, etc., "with intent to deceive or defraud" His Majesty or other persons. The combined phrase does not seem to have been employed again in a forgery Act, since neither of the consolidating statutes of 1830 (11 Geo. IV and 1 Will. IV, c. 66) and 1861 (24 & 25 Vic., c. 98) reproduced the substance of section 1 of the 1803 Act with anything more than the single phrase "intent to defraud." On the other hand, "intent to deceive or defraud" did occur in other nineteenth-century Acts relating to offences akin to forgery, *e.g.*, in section 84 of the Larceny Act, 1861, and section 166 of the Companies Act,

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1862. No instance, however, has been discovered of a statute defining forgery in terms of " intent to deceive " except as an alternative to the phrase " intent to defraud." It seems fair to say, then, that the 1913 Act established the first occasion upon which in legislation about forgery the two phrases " intent to defraud " and " intent to deceive " were brought into any regular combination with or dissociation from each other. While this compels us, I think, to treat them as not being synonymous with each other for the purposes of the Act, I do not conclude, on the other hand, that it requires us for the same purpose to give a more limited meaning to " defraud " than it would otherwise have had, unless not doing so would involve us in finding no independent meaning at all for the word " deceive."

The second consideration which weighs with me is that by 1913 the word " defraud," when used in connection with forgery, had been a frequent subject of judicial decision and institutional comment. On most occasions the exposition had related to forgery as a crime at common law; but forgery was also becoming increasingly a statutory crime by virtue of those various Acts which had either punished forgery without explicitly referring to intent to defraud or had explicitly imported that intent into the offence proscribed. The 1913 Act, unlike its predecessors of 1830 and 1861, was not merely an Act consolidating a number of previous enactments on the subject of forgery. Its title declares it to be an Act for " consolidating, simplifying and amending the Law of Forgery." In my opinion, it superseded forgery as a crime at common law in the cases to which it applied, though there still remained such a crime (see section 14), just as much as it superseded the statutory offences whose constituent Acts it amended or repealed. While it did essay a definition of the act of forgery :—" the making of a false document in order that it may be used as genuine and . . . the counterfeiting of [certain] seals or dies " (see section 1 (1)), it did not introduce any definition of " intent to defraud " or, for that matter, of " intent to deceive." In that state of affairs I cannot doubt that the words " intent to defraud " in the Act must be understood in the light of any established legal interpretation that prevailed at the date of the passing of the Act.

Now I think that there are one or two things that can be said with confidence about the meaning of this word "defraud." It requires a person as its object: that is, defrauding involves doing something to someone. Although in the nature of things it is almost invariably associated with the obtaining of an advantage for the person who commits the fraud, it is the effect upon the person who is the object of the fraud that ultimately determines its meaning. This is nonetheless true because since the middle of the last century the law has not required an indictment to specify the person intended to be defrauded or to prove intent to defraud a particular person.

Secondly, popular speech does not give, and I do not think ever has given, any sure guide as to the limits of what is meant by "to defraud." It may mean to cheat someone. It may mean to practise a fraud upon someone. It may mean to deprive someone by deceit of something which is regarded as belonging to him or, though not belonging to him, as due to him or his right. It passes easily into metaphor, as does so much of the English natural speech. Murray's *New English Dictionary* instances such usages as defrauding a man of his due praise or his hopes. Rudyard Kipling in the First World War wrote of our "angry and defrauded young." There is nothing in any of this that suggests that to defraud is in ordinary speech confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss.

Has the law ever so confined it? In my opinion, there is no warrant for saying that it has. What it has looked for in considering the effect of cheating upon another person and so in defining the criminal intent is the prejudice of that person: what Blackstone (4 *Commentaries* 245) called "to the prejudice of another's right." East's *Pleas of the Crown* (1803) Vol. II, pp. 852–854, makes the same point in the chapter on Forgery: "in all cases of forgery, properly so called, it is immaterial whether any person be actually injured or not, provided any may be prejudiced by it."

Of course, as I have said, in ninety-nine cases out of a hundred the intent to deceive one person to his prejudice merely connotes the deceiver's intention of obtaining an advantage for himself by inflicting a corresponding loss upon the person deceived. In all such cases the economic explanation is sufficient; but in that special line of cases where the person deceived is a public authority or a person holding a public office, deceit may secure an advantage for the deceiver without causing anything that can fairly be called either a pecuniary or an economic injury to the person deceived. If there could be no intent to defraud in the eyes of the law without an intent to inflict a pecuniary or economic injury, such cases as these could not have been punished as forgeries at common law, in which an intent to defraud is an essential element of the offence, yet I am satisfied that they were regularly so treated. I think that it is sufficient if I mention three authorities without analysing them. First, HARRIS (1833) 1 Mood. 393, in which a forged order purporting to be a direction from a magistrate to the keeper of a county gaol to discharge a prisoner was held by all the judges on the case reserved to be capable of sustaining a conviction for forgery at common law. Secondly, in SHARMAN (1854) Dears. 285, a forged certificate giving false references as to employment, put forward in order to obtain appointment as a schoolmaster, was held to support a similar conviction. The indictment in that case charged "intent to obtain the emoluments . . . and to deceive." Thirdly, there is the case of MOAH (1858) 7 Cox 503, in which the Court of Criminal Appeal upheld a conviction for forgery at common law where a forged letter of recommendation had been delivered to a chief constable by a forger for the purpose of obtaining the situation of a police constable. TOSHACK (1849) 4 Cox 38 seems to me to be the most explicit authority on the subject prior to 1913. Toshack had forged a testimonial over the purported signature of a master of a sailing ship in order to deceive Trinity House examiners and so obtain his master's certificate. He was tried on an indictment containing a number of counts, including one of unjustly obtaining a piece of paper value one penny (the master's certificate), but the case as reported only dealt with the seventh and ninth counts, charging respectively that he forged the testimonial with intent to injure, deceive, prejudice and defraud the examiners and that he did the same thing for the purpose of deceiving Trinity House. He was convicted of the offence of forgery at common law and the conviction on these two counts being reserved for the opinion of the judges (Pollock C.B., Patteson J., Wightman J., Platt B., Talfourd J.), their unanimous opinion delivered by Alderson B.[1] was that the offence had been committed.

In my opinion, it is clear that in connection with this offence the intent to defraud existed when the false document was brought into existence for no other purpose than that of deceiving a person responsible for a public duty into doing something that he would not have done but for the deceit or not doing something that but for it he would have done. Correspondingly, to put such a document forward with knowledge of its falsity and with a similar intent was to commit the crime of uttering it. That seems to me to be the essential point of the present appeal.

Inevitably the argument in this House concentrated much attention upon what was said by Buckley J. in the course of his judgment in *Re* LONDON & GLOBE FINANCE CORPORATION [1903] 1 Ch. 728, at p. 732, when he took occasion to point out the distinction as he saw it between an intention to deceive and an intention to defraud. The passage was criticised by the appellant's counsel as being either incomplete or inaccurate as an exhaustive statement of the law on the point: on the other hand, it was put forward on behalf of the Crown as being an authoritative exposition of the meaning of " intent to deceive " and " intent to defraud " in the crime of forgery, which must be taken as adopted and read into those phrases when they occur in the Act of 1913. I think that the criticism is misconceived and I think, on the other hand, that the argument for the Crown goes too far: but, before I say more, it is convenient to set out the familiar passage in full. "To deceive," he said, "is, I apprehend, to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely, it may be put that to deceive is by falsehood to induce a state of mind: to defraud is by deceit to induce a course of action." There is no doubt that what was said was *obiter.* What the learned judge was deciding in the case was whether to sanction a prosecution of Mr. Whittaker Wright under the Larceny Act, 1861, ss. 83 and 84, and the Companies Act, 1862, s. 166, at the expense of the company's funds. It was not necessary to that decision to offer a definition of either one or both of the "intents" that would be involved or to express himself in the terms of a judge directing a jury. There is no reason to suppose that he intended to do more than give a general indication of the nature of the offences that were in question and of the distinction between them. I cannot accept that a judicial utterance of this kind could ever qualify as an authoritative exposition of words employed in a subsequent statute within the doctrine laid down by this House in BARRAS *v.* ABERDEEN STEAM TRAWLING CO. [1933] A.C. 402, where the meaning of the single word "wreck" was in question. On the other hand, I do not think that what he said is any the less valuable because it does not contain an exhaustive account of the legal significance of deceit and fraud. Certainly, so far as civil liability is concerned, deceit can involve a reckless indifference to truth or falsity as well as the deliberate making of false statements; and in all cases it may involve the inducing of a man to believe a thing to be false which is true as well as to believe to be true what is false. But the learned judge was speaking of the nature of criminal intent in the limited field of activities such as wilful destruction or falsification of books and publication of false statements or accounts, and, apart from that, there would be no difficulty in enlarging upon his text if it were necessary to do so in the context of any particular case. Again, it is said and, I think, justly, that to defraud must involve something more than the mere inducing of a course of action by deceit. But these words, which are found in the last sentence of the whole passage, must be understood in the light of what had gone before. They do not qualify the description of "defraud" as "by deceit to induce a man to act to his injury": what they do is to point the contrast between deceiving, the essence of which is to bring about a state of mind, and defrauding, the essence of which is to bring about a course of action, whether doing something or refraining from something.

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[1] It does not appear from either of the reports whether Alderson B. was a member of the Court for Crown Cases Reserved which decided the point.

It is this last point which constitutes the most important element in the whole passage. It is obvious that it was at once appreciated that it expressed briefly and with felicity the significant distinction between the two kinds of intent when they were referred to together or apart in statutes dealing with criminal offences. The 1905 (23rd) edition of Archbold's *Criminal Pleading and Practice* incorporated Buckley J.'s words in full and they have regularly appeared in subsequent editions. By 1913 they had been cited with approval in a criminal appeal as illustrating or defining "intent to defraud" (see BENNETT AND NEWTON (1913) 9 Cr.App.R. 146). They were treated as containing an authoritative distinction between "defraud" and "deceive" in BASSEY (1931) 22 Cr.App.R. 160: and by 1953 they had become so much the established text as to be referred to by the Lord Chief Justice (Lord Goddard) as the "*locus classicus*, which has been cited with approval over and over again" (WINES (1953) 37 Cr.App.R. 197; [1954] 1 W.L.R. 64). I think that it would be perverse not to recognise that ever since they were reported they have been accepted and used in the criminal courts as providing a satisfactory account of the essentials of "defrauding" on the one hand and "deceiving" on the other. I imagine that a clear phrasing of the distinction was the more welcome because in the past judges dealing with forgery as a crime at common law had not always thought it necessary to distinguish between an intent to deceive and an intent to defraud and had sometimes spoken of the latter under the title of the former. Thus East's *Pleas of the Crown, loc. cit.* 853, quotes Buller J. and Eyre B. as each having described forgery as the making of "a false instrument with intent to deceive" in different trials and adds the comment: "In the word 'deceive' must doubtless be intended to be included an intent 'to defraud': and so it was decided."

It was objected that, if defrauding was treated as meaning something so wide as any deceiving of another to his injury, his detriment or his prejudice, it provided a dangerously wide definition of a crime. It was said, for example, that by such a definition the writing of a faked letter to another giving him a fictitious appointment would constitute the crime of forgery. I do not know that I should regard this as so startling a result as to lead me to reconsider what seems to be the long-accepted definition of defrauding: after all, the crime in question only exists if there is the making of a false document in order that it may be used as genuine, which is itself dishonest and a cheat. Words, not being capable of infinite division for purposes of precise measurement, can only convey ideas that are to some extent general and I think it may be that the imposition suggested does technically constitute the crime of forgery, unless the rule that *lex non curat de minimis* puts it out of court or a jury concluded that there was no real intent to prejudice or injure. I suppose that in any event these theoretical arguments have to be tried by a certain standard of common sense, and I cannot say that in practice I should expect to see a crop of criminal prosecutions based on tricks or deceptions of this kind.

There is, I think, more weight in the criticism that, if in interpreting the 1913 Act "intent to defraud" is given as wide an ambit as to include all deceptions to another's prejudice, there is virtually no ambit left to be covered by the other statutory intent, "intent to deceive," since it is difficult to imagine an instance of a man forging a document in order that it should be used as genuine without having at the same time an intention of affecting another's conduct to his prejudice. It is difficult, but it is not impossible. There can be cases, I think, in which there is an intent to deceive and no more. HODGSON (1856) Dears. & B. 3 may illustrate the kind of thing that can occur. There a diploma of the College of Surgeons had been altered by substituting Hodgson's for the genuine name: on the other hand, Hodgson had made no use of the document, so altered, except to hang it on the wall of his room and show it to two friends who inquired as to his qualifications. It was held by the court that this did not constitute forging or uttering at common law, because there was no criminal intent in what he did. It is not clear that the court had in mind any precise distinction between defrauding and deceiving and, as I have said, the distinction was not always made with regard to the crime at common law. But if a question arose under the 1913 Act upon a similar alteration of some document falling within, say, section 3 or section 4 (2), I think that it would be hard to say that there had not been an "intent to deceive" within the meaning of the Act.

I am, therefore, of opinion that the judgment of the Court of Criminal Appeal, the subject of the present appeal, was clearly right. The view there taken is in accordance with what was said by my noble and learned friend Lord Tucker in BOARD OF TRADE *v.* OWEN & SETH-SMITH, 41 Cr.App.R. 11, at p. 40; [1957] A.C. 602, at 622, and the fuller argument in this case has not led me to think that it needs any qualification.

LORD TUCKER—My Lords, I agree that this appeal should be dismissed for the reasons which have been stated by my noble and learned friend on the Woolsack. I have also had the advantage of reading in print the opinion which is to be delivered by my noble and learned friend Lord Denning and desire to express my agreement therewith.

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Lord Keith of Avonholm—My Lords, I agree.

Lord Denning—My Lords, Robert John Welham and two other men were charged at the Central Criminal Court with conspiracy to defraud and with uttering forged documents. Welham was acquitted of the conspiracy, but convicted of the uttering and sentenced to nine months' imprisonment. He appealed to the Court of Criminal Appeal. That court dismissed his appeal. The Attorney-General gave his fiat for a further appeal. So it now comes before your Lordships. The counts for uttering charged Welham with uttering forged documents, contrary to section 6 of the Forgery Act, 1913. It is sufficient for present purposes to take the second count which was put to him on his arraignment in these words: "On January 16, 1957, with intent to defraud, you uttered a forged hire-purchase proposal form and hire-purchase agreement purporting to be signed by J. Murray of 4 Meynell Crescent, E.9, knowing the same to be forged." To that charge he pleaded Not Guilty. Likewise to the third count (relating to forged credit sale agreements) he pleaded Not Guilty.

According to the evidence for the prosecution, Welham was the manager of a firm of motor dealers in Brighton called Motors (Brighton), Ltd. These dealers obtained money from finance companies in London called Consortium Finance, Ltd., and Masterton Finance and Trading Services, Ltd. They did this by submitting to the finance companies sets of documents which appeared to relate to the hire-purchase of lorries or the credit-sale of lorries, but the documents were fictitious. Take, for instance, the hire-purchase document which was the subject of count 2. The document named one "J. Murray" as the hirer of lorry No. XMT 756, but there was in fact no such lorry, and although there was such a person as Mr. Murray, he had not in fact signed the hire-purchase document nor had he authorised it to be signed in his name. His signature "J. Murray" had been forged. It purported to be witnessed by the accused "R. J. Welham," but Welham had never witnessed it.

Welham had signed the document in the place for the witness. His own signature was genuine enough, but he had attested a forgery. It was on that document and others like it that the motor dealers obtained money from the finance companies. That was cogent evidence of a conspiracy to defraud the finance companies. The two other men were convicted of it, but Welham was acquitted. Welham's defence to the conspiracy charge which, no doubt, earned him his acquittal was this: he said that he did not intend to defraud the finance companies at all. He had been brought into the matter by one Prater, a director of the motor dealers. Prater told him that they wished to borrow money from the Consortium Finance Company. The company were unable to lend money on straight loans owing to the restrictions on borrowing then in force, and also owing to the objects in their memorandum and articles, but they were ready to lend money under cover of hire-purchase documents, so long as nobody outside the "immediate circle" knew of it. The documents were bogus and were known by the finance company to be bogus, but they were necessary to cover up the loans. "The purpose was," he said, "to satisfy any Board of Trade investigation." The jury must be taken to have accepted Welham's belief on this point, for they acquitted him on the charge of conspiracy to defraud the finance companies.

There remained, however, the counts for uttering forged documents with intent to defraud, knowing them to be forged. To these counts Welham said, in the first place, that he did not know the documents were forged. At the time when he signed as a witness, the signature of the hirer was, he said, in blank. Take the hire-purchase document in count 2. "J. Murray" was, he said, not on it when he signed. He sent it to London to be completed and when he got it back, the signature "J. Murray" was then filled in, and he accepted that signature as being genuine. He then sent the document forward to the finance company. He acknowledged that there was no such lorry as described in the document, but he believed that the signature was genuine. The next answer made by

Welham to the charge of uttering was that he had no intent to defraud. There was, however, in this respect a significant difference between the count for conspiracy and the counts for uttering. The conspiracy was charged as being to defraud specified persons, namely, the finance companies, but the uttering was charged as uttering of forged documents "with intent to defraud" generally, without specifying any particular person or persons. On these counts for uttering Welham seems to have been prepared to admit that he had an intent to deceive, but not that he had an intent to defraud. His position can be summed up in his answers to the last two questions addressed to him by the Common Serjeant: "Q. I think you told Mr. Maxwell Turner . . . that you passed these documents on to the Consortium (Finance Company), knowing that they were fictitious, with the object of deceiving, among other things, the Capital Issues Committee? A. I did say that. At that time I knew there were credit restrictions, but the Capital Issues Committee did not mean anything to me; that is to say, with the object of defeating the regulations. Q. And inducing that Committee to do something which in fact they were bound in law to prevent. A. Yes, my Lord." The Common Serjeant appears to have taken the view, on those answers, that Welham had admitted an intent to defraud, for he told the jury: "It is not incumbent on the prosecution in these two counts, as it is in the case of the first count, to prove an intent to defraud any particular person, and therefore if the prosecution have succeeded in proving against Welham that he was a party to putting forward documents which he knew to be forged, and he put them forward with the dishonest intention, as he himself said, of defrauding the Capital Issues Committee, well, then, he would be guilty on those two counts. . . . They have got to prove an intent to defraud and Welham's own case is that the intention here in respect of these bogus documents was to defraud the Capital Issues Committee by deceiving them in not preventing something which it was their duty in law to prevent."

The jury retired and returned with the question: "Does

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'with intent to defraud' mean that when Welham signed as a witness before hirer's signature, was he defrauding?" The Common Serjeant directed them again on Welham's two defences. He told them that, in order to convict Welham, they must be satisfied that he knew Murray's signature was not genuine, and then went on to say: "I have ventured to direct you upon his own evidence, if that be so, these documents, like all the others, were put forward for the purpose of pulling the wool over the eyes of the Capital Issues Committee as he understood it and to cover up the fact, if there should be an inquiry, that these big loans had been made by the hire-purchase companies to Motors (Brighton), Ltd., . . . on his own evidence . . . there would not be an intention to defraud because the intention to defraud would not be the intention to defraud the hire-purchase companies but to defraud the Capital Issues Committee by deceiving them into taking a course of action which would lead them into not preventing something happening which it was their duty in law, if they knew of it, to prevent." Something appears to have gone wrong in the transcribing of the last passage, but the Common Serjeant was no doubt repeating again to the jury what he had already told them. The jury retired again and found Welham Guilty on counts 2 and 3 of uttering forged documents.

Such being the direction of the Common Serjeant, these complaints were made of it: (1) that the Common Serjeant failed to give the jury a clear direction as to the distinction between an intent to defraud and an intent to deceive; (2) that the Common Serjeant incorrectly told the jury that on Welham's own case he had an intention to defraud; (3) that there was no evidence that Welham had an intention to defraud; (4) that in any case it should have been left to the jury to say whether Welham had an intention to defraud. My Lords, I think that all these complaints depend on whether, on Welham's own evidence in the witness box, he had an intent to defraud: for if he had, then the Common Serjeant was entitled to direct the jury as he did. There was no need

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for him to embark on a discussion of the difference between an intent to defraud and an intent to deceive, if the evidence did not give rise to it; and there was no need for him to leave it to them as an open question when Welham's own evidence permitted only of one answer. He said to them in effect what many judges have said before: " Why even if you accept his own evidence on this point, you may well think he had an intent to defraud."

The crucial question is, therefore, what is the meaning of the words " intent to defraud " in the Forgery Act, 1913, which were contained in the indictment. To determine this question I must set out the material sections of the Act: " 1.—(1) For the purposes of this Act, forgery is the making of a false document in order that it may be used as genuine . . . and forgery with intent to defraud or deceive, as the case may be, is punishable as in this Act provided. . . . 4.—(1) Forgery of any document, which is not made felony under this or any other statute for the time being in force, if committed with intent to defraud, shall be a misdemeanour. . . . (2) Forgery of any public document which is not made felony under this or any other statute for the time being in force, if committed with intent to defraud or deceive, shall be a misdemeanour. . . . 6.—(1) Every person who utters any forged document . . . shall be guilty of an offence of the like degree . . . and an conviction thereof, shall be liable to the same punishment as if he himself had forged the document. . . . (2) A person utters a forged document . . . who, knowing the same to be forged, and with either of the intents necessary to constitute the offence of forging the said document . . . uses, offers, publishes, delivers, disposes of, . . . or puts off the said forged document." My Lords, the declared object of the Forgery Act, 1913, is " to consolidate, simplify and amend the law relating to forgery and kindred offences ": and if its language were clear and unambiguous, it would not be right to embark upon a close consideration of previous authorities in order to ascertain its meaning; see BANK OF ENGLAND *v.* VAGLIANO BROTHERS [1891] A.C. 107, at pp. 144, 145, by

Lord Herschell. But the more I consider the phrase "with intent to defraud" in this statute, the more doubtful do I find its import. It appears to be used in contrast to the phrase "with intent to deceive," but whilst I can see there may on occasion be a distinction between these two intents, I find it extremely difficult to say where the one intent ends and the other begins. Much valuable guidance is to be obtained from the dictum of Buckley J. in *Re* LONDON & GLOBE FINANCE CORPORATION [1903] 1 Ch. 728, at p. 732, but this has been criticised by modern scholars. It has even been hinted that it conceals within it the fallacy of the illegitimate antistrophe, which sounds, I must say, extremely serious. These scholars seem to think they have found the solution. "To defraud," they say, involves the idea of economic loss. I cannot agree with them on this. If a drug addict forges a doctor's prescription so as to enable him to get drugs from a chemist, he has, I should have thought, an intent to defraud, even though he intends to pay the chemist the full price and no one is a penny the worse off.

Seeing, therefore, that the words of the statute are of doubtful import, it is, I think, legitimate to turn for guidance to the previous state of the law before the Act; and here I would say at once that the phrase "with intent to defraud" has been the standard usage of lawyers in defining forgery for over 160 years. In 1796 all the judges of England laid down the definition of forgery as "the false making of a note or other instrument *with intent to defraud*," see PARKES AND BROWN, 2 Leach 775, at p. 785, East's *Pleas of the Crown*, Vol. II, 765; and ever since that time it has been held that the very essence of forgery is an *intent to defraud* and it must be laid in the indictment, see East's *Pleas of the Crown* (1803) Vol. II, p. 988, Chitty's *Criminal Law* (1826) Vol. III, pp. 1039, 1042a. I cannot help thinking that when Parliament in section 4 (1) of the 1913 Act used a phrase so hallowed by usage, it used it in the sense in which it had been used by generations of lawyers. It was never by them confined to the causing of economic loss. Let me prove this by taking some examples.

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Take the case where a man forges a reference as to character, intending to get employment by means of it. It is clear forgery (see SHARMAN (1854) Dears. 285, MOAH (1858) Dears. & B. 550), but there may well be no economic loss intended. The man may intend, if he gets the job, to render full service in return for his wages, or the post which he seeks may be unpaid, such as a justice of the peace. But he has the intent to defraud all the same. Take next the case where a servant steals his master's money and afterwards forges a receipt or other document so as to cover up his defalcations. This too is forgery (see MARTIN (1836) 1 Mood. 483). He does not intend to deprive his master of anything, for he has already done that. He may not even do it so as to keep his job, because he may be under notice. What he really intends to do is to cover up his tracks so that he should not be found out. But he has the intent to defraud nonetheless. Then there are the cases concerned with the release of prisoners. If a man forges an order or letter to the sheriff or to the governor of a prison, intending thereby to secure the release of a prisoner, he is guilty of forgery at common law (see FAWCETT'S case (1793) 2 East P.C. 862 and HARRIS (1833) 6 C. & P. 129; 1 Mood. 393). There is no idea of economic loss here. He has no intent to deprive the gaoler of any money or valuable thing, but at common law he is held to have an intent to defraud. Mr. Gardiner rather suggested that the reason for those decisions was that the documents were documents of a public nature, but I do not so read them. Even if they were public documents, it was still essential that there should be an intent to defraud. Ever since WARD'S case in 1727 (2 Str. 747; 2 Ld. Raym. 1461) public and private documents were at common law on the same footing in this respect (see East's *Pleas of the Crown*, Vol. II, pp. 859–862). The forgery of any of them was a misdemeanour if done with intent to defraud, but not otherwise (see HODGSON (1856) Dears. & B. 3, at p. 10, *per* Jervis C.J.). There remains the case of TOSHACK (1849) 1 Den. 492; 4 Cox 38, which is to my mind decisive. Toshack, a seaman, forged a certificate of good conduct so as to be admitted to sit for an examination for his master's certificate. He had no intention to deprive the examiners or Trinity House of any money or valuable thing. The piece of paper, value one penny, was not mentioned in the counts on which he was convicted, but he was held guilty of forgery. Alderson B. said (4 Cox, at p. 41): "It does amount to a very serious offence if persons do forge certificates of this sort and are found to utter them for the purpose of deceiving the Trinity House."

What is the common element in all these cases? It is, I think, best expressed in the definition given by East in his *Pleas of the Crown*, Vol. II, p. 852. He treats the subject, I think, better than any writer before or since: "To *forge* (a metaphorical expression borrowed from the occupation of the smith), means, properly speaking, no more than to *make* or *form*: but in our law it is always taken in an evil sense; and therefore forgery at common law denotes a *false* making (which includes every alteration of or addition to a true instrument), a making *malo animo*, of any written instrument *for the purpose of fraud and deceit*. This definition results from all the authorities ancient and modern taken together." That was written in 1803, but it has been always accepted as authoritative. It seems to me to provide the key to the cases decided since it was written as well as those before. The important thing about this definition is that it is not limited to the idea of economic loss, nor to the idea of depriving someone of something of value. It extends generally to the purpose of fraud and deceit. Put shortly, "with intent to defraud" means "with intent to practise a fraud" on someone or other. It need not be anyone in particular. Someone in general will suffice. If anyone may be prejudiced in any way by the fraud, that is enough.

At this point it becomes possible to point the contrast in the statute between an "intent to deceive" and an "intent to defraud." "To deceive" here conveys the element of deceit, which induces a state of mind, without the element of fraud, which induces a course of action or inaction. Take the case of a private document, for instance, where a man fabricates a letter so as to puff himself up in the opinion of others. Bramwell B. put the instance: "If I were to produce a letter purporting to be from the Duke of Wellington inviting me to dine and say 'See what a respectable person I am,'" MOAH (1858) Dears. & B. 550, at pp. 552–553. There would then be an intent to deceive, but it would not be punishable at common law or under the statute, because then it would not be done with intent to defraud. Take next the case of a public document, for instance, a parish register. If a man should falsify it so as to make himself appear to be descended of noble family, for the sake of his own glorification, he would not be guilty of an intent to defraud and would therefore not be punishable at common law (see HODGSON (1856) Dears. & B. 3, at p. 8), but he would have an intent to deceive and he would be punishable under the present statute, as indeed he was under its predecessors, such as the Forgery Act, 1861, s. 36.

So much for the principal point under discussion. Mr. Gerald Gardiner did make a further point. He said that the intent must be to defraud the particular person to whom the document is first presented or his agent, and that it was insufficient if he intended to defraud somebody else. This is not correct. It has long been ruled that it is no answer to a charge of forgery to say that there was no intent to defraud any particular person, because a general intent to defraud is sufficient to constitute the crime. So also it is no answer to say that there was no intent to defraud the recipient, if there was intent to defraud somebody else (see TAYLOR (1779) 1 Leach 214; 2 East P.C. 960).

In my judgment, section 4 (1) of the Forgery Act, 1913, only restates the requirements of the common law of forgery. The "intent to defraud" there mentioned is the same intent as was required by the common law. It is satisfactory to find that in the cases subsequent to the Act the courts have been giving it the same meaning as they did before. BASSEY (1931) 22 Cr.App.R. 160 is particularly in point, and I am glad to find this confirmed by what my noble and learned friend Lord

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Tucker said in BOARD OF TRADE *v.* OWEN AND SETH-SMITH, 40 Cr.App.R. 11, at p. 40; [1957] A.C. 602, at p. 622. Applying this meaning to the present case, it appears that Welham on his own evidence had an intent to defraud, because he uttered the hire-purchase documents for the purpose of fraud and deceit. He intended to practise a fraud on whomsoever might be called upon to investigate the loans made by the finance companies to the motor dealers. Such a person might be prejudiced in his investigation by the fraud. That is enough to show an intent to defraud. I think the Common Serjeant was entitled to direct the jury as he did.

I find myself in entire agreement with the Court of Criminal Appeal and I would dismiss this appeal.

LORD MORRIS OF BORTH-Y-GEST—My Lords, I agree that this appeal should be dismissed for the reasons which have been stated by my noble and learned friends.

Appeal dismissed.

Solicitors: Bellamy, Bestford & Co., for the appellant.

BEFORE

MR. JUSTICE STREATFEILD, MR. JUSTICE DONOVAN AND MR. JUSTICE SACHS

1960
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PATRICK JOSEPH CLYNES

Summing-up—Corroboration—No Explanation of what is Meant by Corroboration—Lie to Police Relied on as Corroboration—Necessity for Careful Direction.

Where a judge is required, as a matter of law or practice, to give the jury a warning on corroboration, he must tell the jury what is meant in law by corroboration, though he is not obliged to draw the jury's attention to specific items of evidence which may or may not amount to corroboration.

In any sexual offence, even where the commission of the offence is not disputed and the only issue is one of identity, a warning on corroboration is required.

SAWYER (1959) 43 Cr.App.R. 187 followed.

Where an alleged lie told by the prisoner is relied on as amounting to corroboration, which it may, though it does not follow that it must, a careful direction on this matter is necessary.

CREDLAND *v.* KNOWLER (1951) 35 Cr.App.R. 48 followed.

Appeal against conviction.

The appellant was convicted at Liverpool Crown Court on January 7, 1960, of indecent assault on a woman and was sentenced by the Recorder (Neville Laski, Esq., Q.C.) to eighteen months' imprisonment.

At the trial the only issue was that of identity, and in his evidence the appellant denied that he had been in the place where the assault took place (Spekeland Road, Liverpool) at the time of the assault. He had, however, prior to the trial said to a police officer: " I never touched the woman; I only asked her for the time in Spekeland Road." The material portions of the summing-up appear in the judgment.

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Peter Bruce, for the appellant. The summing-up of the Recorder with regard to corroboration was entirely unsatisfactory. In the first place he misdirected the jury with regard to the actual facts of the assault. Secondly, he entirely failed to explain to the jury what is meant in law by corroboration. Thirdly, though there was only one matter capable of affording corroboration, namely an alleged statement previously made by the appellant to the police which was inconsistent with the appellant's evidence at the trial that he was not at or near the place of the assault at the time when it was committed, the way in which the Recorder dealt with this matter must have misled the jury, particularly as he linked it closely with a matter which the Recorder seemed to regard as possible corroboration, though it really was incapable of amounting to corroboration in any circumstances. That was a question put to a police officer by the appellant about the date to which he was remanded to appear and was completely irrelevant to the issue which the jury had to consider.

R. Z. H. Montgomery, for the Crown. The summing-up of the Recorder with regard to corroboration cannot be considered as entirely satisfactory. In this case, however, as there was no dispute that the offence had been committed by someone and the only issue was one of identity, a warning with regard to corroboration was unnecessary, or, at any rate, less necessary than in the ordinary case where other issues arise. There was one matter capable of affording corroboration, namely, the alleged false statement with regard to his movements previously made by the appellant to the police. This was brought to the attention of the jury and the jury were properly directed that it was capable of affording corroboration.

STREATFEILD J.: This appellant was convicted on January 7, 1960, before the learned Recorder of the Liverpool Crown Court of an indecent assault on a woman of twenty-nine years of age, and was sentenced to eighteen months' imprisonment.

He now appeals to this court by leave of the court on grounds of certain misdirections of the jury by the learned Recorder.

The circumstances giving rise to this case are as follows: On November 8, 1959, the woman in question was walking at night along a road called Spekeland Road. She complained that a man, whom she afterwards identified as the appellant, came up behind her, placed his hand on her skirt at the back on the outside of the skirt in the vicinity of her private parts, and thereby indecently assaulted her. She gave a description to the police after making a complaint to her brother, describing her assailant as wearing a mackintosh and a dark tie, and that was all. The appellant was taken into custody, and the complainant stated that she recognised him by his face as the man who had assaulted her.

The appellant's case in the Crown Court was that he was not the man at all, that he had not been in Spekeland Road and had not indecently assaulted the woman. There was evidence of a police officer, in circumstances with which I will deal in a moment, that in the course of conversation with him the appellant said: "I never touched the woman; I only asked her for the time in Spekeland Road," a statement which, of course, on the face of it was inconsistent with his denial that he was there at all.

Certain complaints are made on behalf of the appellant by Mr. Bruce with regard to the summing-up. He first of all complains that the learned Recorder misdirected or inaccurately directed the jury on the evidence of the actual alleged assault itself. What the Recorder said was: "Both as a matter of law and common sense, if a man goes up to a woman and puts his hand up her clothes and touches her private parts, as this girl had to come and tell you, that is an indecent assault." That, of course, was an inaccurate summary of the woman's evidence. It was not one, however, which was likely to have misled the jury who heard the evidence. It was, however, a slip on the facts by the learned Recorder.

The main complaint with regard to the summing-up concerns the direction given to the jury by the learned

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Recorder on the question of corroboration. It was submitted by Mr. Montgomery that, in a case where the issue is one of identity and where there is no dispute as to the actual assault, it is not necessary for the court to give a direction on corroboration at all. That is not the view of this court, nor was it the view of this court in SAWYER (1959) 43 Cr.App.R. 187 where the charge was one of a different sexual offence, and the only issue was identity, and the court stressed the necessity for a warning on corroboration.

The direction or warning which the learned Recorder gave on the need for corroboration, so far as it went, appears to be accurate enough. He stated that in sex cases it was the practice of judges to warn juries that they ought not to accept the uncorroborated evidence of either men or women making the charge. He then referred in detail to the words of Sir Matthew Hale giving the reason for the desirability of corroboration in such cases, which included a statement that, even if there was no corroboration, the jury would be entitled to say that the accused was guilty if they believed the girl's evidence. That warning the learned Recorder gave but, unfortunately, he never described what was meant in law by corroboration. It is quite true that in this court it has been laid down that a judge is not obliged to draw the jury's attention to specific items of evidence which may or may not be corroboration, but it is, in our view, at least necessary, in order to make the warning intelligible, to tell the jury what is meant by corroboration. No particular language is necessary to describe it, but it is at least necessary to explain to the jury that what is required is some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence. Any such description of corroboration is, unfortunately, completely absent from the learned Recorder's summing-up.

When he came to deal with the evidence, what he said was this: "Now comes a matter which you are entitled to consider as being of importance; it may or may not be corroboration and a judge cannot tell you what is corroboration; you have got to decide for yourselves whether it is corroboration. [The appellant] went to the police station. He was then remanded for the hearing to take place at a later date, on November 16, having previously denied to the police, according to the police, that he was the man, indeed saying that he was not the man. He says he had a solicitor. Now, do you believe what the police officer says? Why on earth the police officer should invent this I do not know, but you may think of a reason. First, he said, and it is agreed, 'What was the date I was remanded to appear again?.' If he had a solicitor there, why on earth should he ask the policeman? The most obvious person to ask is his solicitor. He told him December 9 and then the officer said he said: 'Do you think I should get a solicitor?'. What purpose in the world could there be that the prisoner should ask that? It is for you, of course. He was told by the officer it was a matter entirely for himself. He then said: 'How do you think I am fixed?'. He denies that. The officer told him it would be better if he did not have any conversation on that point." Then I break off in the middle of a sentence. Emphasis is laid on the passage I have just read about the date to which he was remanded. It is quite impossible to understand how that could begin to be any corroboration implicating the accused in the commission of this offence. It appears to this court that the matter on which the learned Recorder is there inviting the jury to place reliance is completely irrelevant to a question of this sort. Then he proceeds in the same sentence and finally comes to the one point which conceivably, if it was properly dealt with, could amount to corroboration. The sentence where I broke off proceeds: "and then, according to the officer it is denied by the man 'I never touched the woman. I only asked her for the time in Spekeland Road.' If he said that, you may think that a very crucial matter and of more significance in relation to the rest of the case. There, of course, you have to decide whether it has been said or not, because he denies it." Then the Recorder goes on to deal with the appellant's evidence that he was not there at all. If the appellant was saying at the trial that he was not there, and if he did say earlier to the police officer: "I only asked her for the time in Spekeland Road," it would mean that the story he was putting up was a false one; but it does not follow that, because a person has told a lie to a police officer or otherwise, that necessarily amounts to corroboration. Indeed, this question has been dealt with in CREDLAND *v.* KNOWLER (1951) 35 Cr.App.R. 48. On page 54 the Lord Chief Justice, Lord Goddard, said this: "It seems to me that there are two quite distinct issues here. Most of the argument and, no doubt, much of the case, has dealt with the lie which the appellant told and the question whether the fact that the appellant told a lie is in itself corroboration. I should be very sorry to lay down, and I have no intention of laying down, and I do not think any case has gone the length of laying down, that the mere fact that an accused person has told a lie can in itself amount to corroboration. It may, but it does not follow that it must. If a man tells a lie when he is spoken to about an alleged offence, the fact that he tells a lie at once throws great doubt upon his evidence, if he afterwards gives evidence, and it may be very good ground for rejecting his evidence, but the fact that his evidence ought to be rejected does not of itself amount to there being corroboration." He then goes on to deal with the particular facts of that case, which deal with the question of principle.

Therefore, one reaches the position that even if a statement is said to be a lie, it may or may not amount to corroboration, but it is obviously a matter which requires careful direction. In this case, unfortunately, there was no such direction. A lie, for instance, may come from a man acting in pure panic, in which case it is not corroboration. It may, on the other hand, be indicative of a man's sense of guilt, in which case it may be, but that is a matter which ought to be carefully explained to the jury and left to them. Unfortunately, even this one matter which might be corroboration was not dealt

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with at all until after other matters which certainly could not be corroboration and then was left without any direction on what principles the jury should apply in deciding whether it was corroboration or not.

For those reasons this court has come to the conclusion that the summing-up on the question of corroboration was unsatisfactory, and it is quite impossible for us to say whether, on a proper direction, the jury would have been likely to come to the same conclusion. On the whole, the court has come to the conclusion that the case submitted on behalf of the appellant for the inadequacy of the summing-up on the need for corroboration is made out, and for those reasons this conviction cannot be allowed to stand. The appeal, therefore, will be allowed and the conviction quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ASHWORTH
AND MR. JUSTICE SALMON

JOTTAI COKAR

1960
Apr. 11

Evidence—Character of Prisoner—Cross-Examination on Previous Acquittal—Conviction Quashed—Criminal Evidence Act, 1898 (61 *&* 62 *Vict. c.* 36), *s.* 1 (*f*), *exception* (i).

By the Criminal Evidence Act, 1898, s. 1 (*f*): "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless —(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged. . . ."

The prohibition against any of the matters in the first part of paragraph (*f*) is lifted under exception (i) only if it is sought to prove that the prisoner has committed or been convicted of the other offence and it is not permissible, under this exception, to question a prisoner in regard to a charge in respect of which he has been acquitted.

MAXWELL *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 24 Cr. App.R. 152; [1935] A.C. 309 explained.

Appeal against conviction.

The appellant was convicted at the County of London Sessions on February 15, 1960, of entering a dwelling-house by night with intent to steal and was sentenced by the Deputy-Chairman (F. H. Cassels, Esq.) to eighteen months' imprisonment.

During the night of January 14–15, 1960, the appellant climbed into a house and about ten minutes later was found by the householder sitting in a chair before the fire asleep and wearing the householder's coat. He had made no attempt to steal anything, though there was some loose cash in the room. The appellant gave evidence on his own behalf and, by leave

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of the Deputy-Chairman, was cross-examined on a previous acquittal on a similar charge.

Miss M. E. Wigoder for the appellant. The cross-examination on the previous acquittal was in contravention of section 1 (*f*) of the Criminal Evidence Act, 1898, and should not have been admitted. The appellant had not put his character in issue, and the cross-examination was not relevant to credit, nor was it relevant under exception (i), which, in any event, deals only with proof of commission of other offences and convictions and not with acquittals; nor can the cross-examination be brought within any of the limited occasions referred to in MAXWELL *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 24 Cr.App.R. 152; [1935] A.C. 309 as occasions where cross-examination on a previous acquittal would be permissible. If the cross-examination is held to have been irregular, it must have had a gravely prejudicial effect on the jury, and it is submitted that this is not a case where the court should apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

Michael Corkrey for the Crown. Despite the provisions of section 1 (*f*) of the Criminal Evidence Act, 1898, cross-examination on a previous acquittal is admissible if it goes to a relevant issue. This clearly appears from the decision in MAXWELL *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*supra*). Here it was sought to establish by the cross-examination that on the occasion of the previous charge which resulted in an acquittal the appellant must have learned that to enter premises at night for the purpose of sleeping only was not a criminal offence and for that reason he was putting forward the same defence on the occasion of the offence now charged.

THE LORD CHIEF JUSTICE. This is in some ways a curious case. The appellant, a native of West Africa, was convicted at the County of London Sessions of entering a dwelling-house by night with intent to steal, and he was sentenced to eighteen months' imprisonment. From that conviction he appeals to this court by leave of the court.

The facts are in a very short compass and the details do not matter, but at some time after midnight on January 14, 1960, the appellant climbed into a house in Portland Grove where a Mr. Ballantyne was asleep. He opened the window and got in, and when Mr. Ballantyne woke up, or got up, as he thinks, ten minutes later, he found the appellant sitting in a chair before the fire asleep and with Mr. Ballantyne's overcoat over him. He apparently had made no attempt to steal anything, and there was loose cash in the room which had not been touched. The sole issue was: Had he entered that night with intent to steal?

The appellant was a man of poor intelligence. He was cross-examined, and the answers he gave were very unsatisfactory and not by any means always to the point. The suggestion which the prosecution sought to make was that the appellant knew that it was no offence if he was just found sleeping on the premises. The answers were: "I do not know," and answers of that sort, and ultimately leave was sought to cross-examine the appellant with regard to a previous occasion on which he had been found on private premises and had been charged. In fact he had been acquitted, but it was sought to introduce this evidence to show that on the occasion of the previous charge he must have learned that to be on premises for an innocent purpose such as sleeping was in law no offence. The questions were allowed and, as I have said, the appellant was ultimately convicted.

Whether or not those questions should have been allowed depends on the true interpretation of section 1 of the Criminal Evidence Act of 1898 and, in particular, paragraph (*f*). By paragraph (*f*) it is provided: "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character." There is a complete prohibition of suggesting to a prisoner that he has been previously charged, whatever the result of the charge. The exceptions are threefold and, as is well known, the second and third exceptions are cases where the prisoner has put his character in issue by attacking the evidence of the prosecution or giving evidence himself of good character. No question of that sort is concerned in this case, and the sole question is whether the questions became admissible by reason of the first exception, which is in these terms: " Unless the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged." That, as is well known, is directed to the common class of case where evidence of previous convictions is admissible to show system, and matters of that sort. It is to be observed that the exception is dealing only with the case where proof that he has " committed or been convicted " of another offence is admissible evidence. There is no reference in the exception to being " charged " and, accordingly, it seems to this court that the prohibition against any of the matters in the first part of paragraph (*f*) is lifted, if I may use that word, only when it is sought to prove that he has committed or been convicted of the other offence. Provided that proof of that other offence is admissible evidence, it would be clearly proper as leading up to proof of conviction to say to the prisoner: " Were you charged ? ", and if yes, " Were you convicted ? ", but it seems to this court quite impossible, under exception (i), to question a prisoner in regard to a charge in respect of which he was acquitted.

Reference has been made to MAXWELL *v.* DIRECTOR OF PUBLIC PROSECUTIONS (1934) 24 Cr.App.R. 152; [1935] A.C. 309 and, in particular, to a passage in the speech of the Lord Chancellor, Lord Sankey, at pp. 172, 173 and p. 320 of the respective reports. In the passage in question Lord Sankey said this: " It does not result from this conclusion that the word ' charged ' in proviso (*f*) is otiose: it is clearly not so as regards the prohibition, and, when the exceptions come into play, there may still be cases in which a prisoner may be asked about a charge as a step in cross-examination leading to a question whether he was convicted on the charge." Pausing there, if exception (i) came into play and it was sought to prove that he had been convicted of the previous offence, it would be perfectly possible leading up to that to ask him in the first place whether he had been charged. The Lord Chancellor goes on: "or in order to elicit some evidence as to statements made or evidence given by the prisoner in the course of the trial on a charge which failed, which tend to throw doubt on the evidence which he is actually giving, though this last class of case must be rare and permissible only with great safeguards." The court has not found it altogether easy to understand what the Lord Chancellor was referring to in that last passage, but it might well cover the case where the prohibition has been lifted by the prisoner putting his character in issue. True, he could not then be asked about the charge resulting in acquittal as negativing good character, because, as has been said, such a charge or acquittal is merely a misfortune and does not tend to show bad character. But, the prohibition having been removed, it would be possible then to refer to a charge on which the prisoner had been acquitted in order to bring up evidence of statements made at that trial which tended to conflict with the evidence which he was giving in the current trial. Read in that way, this court does not think that MAXWELL'S case (*supra*) is in any way an authority for the proposition that questions may be put in regard to a charge resulting in an acquittal when the sole ground for removing the prohibition is exception (i), namely, where proof that he has committed or been convicted of another offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged.

In these circumstances, the court feels that cross-examination in this case on the lines referred to was wrongly allowed. It was clearly a matter which was bound to have a considerable influence on the jury, and the court feels that in all the circumstances the only possible course is to quash the conviction. Accordingly, the appeal is allowed and the conviction quashed.

Conviction quashed.

Solicitors: Solicitor, Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ASHWORTH AND MR. JUSTICE SALMON

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ALBERT PATRICK COLLINS

Evidence—Secondary Evidence—Letter Written by Bank Manager—Copy of Carbon Copy Produced by Co-Manager—Admissibility of Copy of Copy—Parol Evidence of Contents of Document—Copy of Document in Existence.

Semble, where secondary evidence is admissible and is to be given by means of a copy of an original document, it is not essential that the original copy should be produced, and there is no objection to a copy of the original copy being relied on, provided that a witness is called who can verify the copy produced as being not only a true copy of the original copy, but also as being in the same terms as the original document.

Where secondary evidence is admissible, as it is well recognised that there are no degrees of secondary evidence, parol evidence of the contents of a document may be given although a copy of the document is in existence.

A bank manager was called to produce a document purporting to be a carbon copy of a letter written by a co-manager. The manager gave evidence that, in the absence of the co-manager, he had searched the files of the bank and extracted certain copies of letters of which the letter in question was one.

Semble (without the point being expressly decided), it might be proper in such a case for the manager to produce a copy of a letter written by a co-manager.

Appeal against conviction and sentence.

The appellant was convicted at Shropshire Quarter Sessions on September 17, 1959, of obtaining money by false pretences and was sentenced by the Chairman (Mr. Justice Stable) to eighteen months' imprisonment, thirteen similar offences being taken into consideration.

The offence charged related to the cashing of a cheque for £5 by the appellant on June 12, 1959, which was returned marked "Account closed," and the case for the prosecution was that the appellant knew at all times after April 9, 1959, on which date his account was in fact closed, that it was closed. A Mr. Everitt, manager of Lloyds Bank, Reading, was called and he sought to produce a document purporting to be a copy of a letter of April 9, 1959, written to the appellant by his co-manager, Mr. Turner. Mr. Everitt stated that in the absence of Mr. Turner he had searched the bank files and had extracted certain copies of letters, of which the document produced was one. The document was a copy of the original carbon copy. After an objection to the admissibility of the document was overruled, the document was admitted in evidence. The prosecution also called a Mrs. Keats, the appellant's landlady, who said that, while the appellant was in hospital, she had opened a registered letter from Lloyds Bank stating that his account was closed and had taken this, with other letters, to the appellant. She said that the registered letter had arrived at her house on April 16 or 17.

C. G. L. Du Cann for the appellant. The evidence of Mr. Everitt and the production of the document by him was open to objection for several reasons. In the first place, Mr. Everitt was not the responsible official to produce any copy of the original letter, which was written by Mr. Turner. A copy could have been produced by Mr. Turner only. Secondly, where secondary evidence is to be given by means of a copy of an original document, only the original copy—in this case the carbon copy of Mr. Turner's letter—is admissible. A copy made from the original copy will not suffice, and this was what was produced in the present case: *Archbold's Criminal Pleading, etc.*, 34th ed., § 1282; LIEBMAN *v.* POOLEY (1860) 1 Stark. N.P. 167; EVERINGHAM *v.* ROUNDELL (1838) M. & Rob. 138. Further, Mr. Everitt wholly failed to prove that the document which he produced was a true copy either of the original carbon copy or the original letter. Again, the evidence of Mrs. Keats was open to objection. She was clearly wrong in her recollection of dates and the jury should have been warned with regard to their approach to her evidence.

P. H. Layton for the Crown. The evidence of Mrs. Keats may have been confused with regard to dates, as the evidence of witnesses often is, but the jury were entitled to regard her as a reliable witness on the material question, namely, whether the letter from the bank closing the appellant's account had been brought to the notice of the appellant. With regard to the evidence of Mr. Everitt, it is well established that there are no degrees of secondary evidence, nor is there any rule that only an original copy can be put in evidence. The only criticism that can fairly be directed to his evidence is that he did not make it clear that he had compared the copy which he produced with the original carbon copy or the original letter. If the court should be of opinion that his evidence is open to objection in that respect, the court is asked to consider whether, in view of the very strong case against the appellant, they should not apply the proviso to s. 4 (1) of the Criminal Appeal Act, 1907.

THE LORD CHIEF JUSTICE: This appellant was convicted at Shropshire Quarter Sessions of obtaining money by false pretences, thirteen similar offences were taken into consideration, and he was sentenced to eighteen months' imprisonment with an order under section 22 of the Criminal Justice Act, 1948. He now appeals to this court against his conviction and sentence by leave of the court.

The offence in question consisted of cashing a cheque for £5 on June 12, 1959, at a garage. The appellant received £5 in return for the cheque, spent about £1 on petrol and the cheque was returned marked "Account closed." The thirteen other offences were of a similar character, the total amount involved being some £66 11s. 8d.

The case sought to be made by the prosecution was that the appellant knew at all times after April 9 that his account was closed. In fact it was closed on that date. The defence was that he had a serious accident, that he had not heard anything before the accident and after the accident he did not remember having heard that his account was closed, and

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throughout he was expecting a man called Elliott to pay in £120.

In proof of the knowledge that the account was closed, Mr. Everitt, a manager of Lloyds Bank at Reading, was called. He sought to produce a document purporting to be a copy of a letter of April 9, which categorically informed the appellant that the account was closed. It was in these terms: "Dear Sir, I am writing with reference to my letter of the 31st March and to advise you that in accordance with the notice given therein your account in our books has now been closed, and I am enclosing your statement showing the final entries. Any further cheques which are presented will be returned marked 'Account closed'." The original letter was called for and was not produced, and Mr. Everitt then produced the document, which was not the carbon copy, but was in fact, so we are told, what was said to be a copy of the carbon copy. His evidence was to the effect that he had a co-manager, Mr. Turner, who had in fact written the letter, that he had in Mr. Turner's absence searched the files and had extracted certain copies of letters, of which this letter was one. He did not produce the carbon copy, as I have said, but he produced a document which we are told was a copy of the carbon, although there is no clear evidence what it was. In those circumstances, Mr. Du Cann, as did counsel at the trial, has taken various points objecting to that evidence. He says, in the first place, that Mr. Everitt was not the responsible official to produce any copy of the letter; and that it should have been Mr. Turner, who had in fact written the letter. On that point this court finds it unnecessary to express any opinion. There may be cases, of which this is one, where it might be perfectly proper for the joint manager of a bank, having full knowledge of the situation, to be able to produce from the files a carbon copy of a letter which had in fact been dictated by his co-manager. It is unnecessary to express any final opinion on that point.

It is then said that if secondary evidence is going to be given by means of a copy, it must be the original copy and

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the original copy only, and not a copy made from the original copy, and Mr. Du Cann has referred us to paragraph 1282 in the current edition of *Archbold* and to the two cases there referred to, LIEBMAN *v.* POOLEY (1860) 1 Stark.N.P. 167 and EVERINGHAM *v.* ROUNDELL (1838) 2 M. & Rob. 138. Again, this court finds it unnecessary to come to any final conclusion on the matter, although, as at present advised, they can see no objection to a copy of a copy being produced, provided that somebody is called who can verify not only that the copy produced is a true copy of the original copy, but also that it is in the same terms as the original. Where the court feels that the case for the prosecution broke down is that Mr. Everitt was quite unable to say, or at any rate did not say, that he had checked the document which he had produced with the carbon copy which was on the file and that what he was producing was a true copy of the original letter. That step in the proof was completely missing and accordingly, in the judgment of this court, the letters, and in particular the letter of April 9, 1959, were wrongly admitted.

The matter does not end there because a Mrs. Keats, who was the appellant's landlady, was called, who said that when he was in hospital as the result of the accident, she took letters which were received at her house to him in the hospital at Reading. She said that one of those letters was a registered letter which she had thought it right to open, and although she could not remember the exact terms of that letter, she was satisfied that it was a letter from Lloyds Bank informing him that the account was closed, and that letter also, she said, she took round to the appellant. So far as that evidence is concerned, this court feels that it was perfectly properly admitted. As has been said many times, there are no degrees of secondary evidence, and accordingly it is perfectly proper to give parol evidence of the contents of a document, albeit that a copy of the document is in existence. No doubt the fact that a copy of the document is in existence means that the parol evidence must be looked upon with some care, and certain criticisms have been made of Mrs. Keats' evidence.

All that I think is criticised is that her recollection was wrong, as it clearly was, in regard to dates, because she said that this registered letter was not received by her till April 16 or 17, which is a long time after the letter spoken to in evidence of April 9. Moreover, by April 16 or 17 the appellant had left the hospital at Reading, so Mrs. Keats was clearly wrong in her recollection with regard to dates, but save in that respect there seems to have been no criticism of her evidence. Finally, there was evidence in the form of a schedule of returned cheques, which showed that over a very considerable period the appellant had been cashing cheques all of which were being returned to drawer.

In these circumstances, this court has come to the conclusion that this is a case in which they ought to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907. As I have said, Mrs. Keats' evidence was admissible evidence. No doubt the jury would on a proper direction have been told that, since the prosecution had not seen fit to produce the carbon, they must look at her evidence with some care, but then the judge would go on to remind the jury that they might not think it was a purely fanciful recollection on her part, because it was clearly proved by the certified copy of the account that the account was in fact closed from April 9. Finally, as I have said, they would be referred to the schedule of returned cheques. It seems to this court that in those circumstances any reasonable jury, properly directed, would have been bound in the circumstances of this case to convict the appellant.

Mr. Du Cann did take a further point that, in any event, there had been misdirection in regard to one of the alleged letters of which copies were produced, a letter of April 24. The court has paid full attention to what Mr. Du Cann has said, but they do not think that it is a point which deserves any special comment.

So far as sentence is concerned, this man of forty-four has seven previous convictions for serious crime. It is unnecessary to go through them in detail. There are a number of offences of dishonesty, and the last conviction was in December 1951

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for housebreaking, when he received eighteen months' imprisonment. It is true that since his release from that imprisonment he has kept clear of trouble until the series of offences which are now under consideration. Nevertheless, this court sees no reason whatsoever to interfere with the sentence. Accordingly, this appeal both as regards conviction and sentence is dismissed.

Appeal dismissed.

Solicitors: Sampson & Co. for the appellant; John C. Gittins & Co., Oswestry, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE GORMAN AND MR. JUSTICE ASHWORTH

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JACK KEELEY

Sentence—Probation Order—Second Probation Order during Currency of First Order still Effective for Purpose of Prisoner being Brought back and Sentenced—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 3 (5).

On November 28, 1958, the appellant was convicted at Oxford City Quarter Sessions of housebreaking and larceny and was sentenced to eight years' preventive detention. He appealed to the Court of Criminal Appeal against sentence and on March 23, 1959, the court substituted a probation order for three years. On September 30, 1959, the appellant was convicted at Hertfordshire Quarter Sessions of housebreaking and larceny and a second probation order for three years was made. On January 5, 1960, the appellant was convicted at East Sussex Quarter Sessions of housebreaking, larceny and false pretences and was sentenced to eighteen months' imprisonment. On February 8, 1960, he was brought back to Hertfordshire Quarter Sessions in respect of the breach of the second probation order and was sentenced to twelve months for the offence of which

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he had been convicted on September 30, 1959. On February 12, 1960, he was brought back to Oxford City Quarter Sessions in respect of the breach of the earlier probation order made by the Court of Criminal Appeal (which was deemed to have been made at Oxford City Quarter Sessions), and was then sentenced to seven years' preventive detention for the original offence. On appeal against that sentence,

Held, that though the first probation order was ineffective for the purposes of supervision and presumably would also have been ineffective for the purpose of any special condition if any such had been imposed, it remained of full effect for the purpose of the prisoner being brought up in respect of the breach of it to receive sentence for the original offence, and the sentence of seven years' preventive detention was valid in law and appropriate to the case.

R. *v.* HAVANT JUSTICES, *ex p.* JACOBS (1957) 41 Cr.App.R. 62; [1957] 1 W.L.R. 365 distinguished.

Appeal against sentence.

The appellant was sentenced at Oxford City Quarter Sessions by the Recorder (John Foster, Esq., Q.C.) on February 12, 1960, to seven years' preventive detention for an offence of housebreaking and larceny for which he had been originally sentenced at those sessions to eight years' preventive detention, but an order of probation for three years had been substituted by the Court of Criminal Appeal. The appellant, having committed a breach of the probation order, was brought back to Quarter Sessions to receive sentence for the original offence.

The conviction and original sentence took place on November 28, 1958. The probation order for three years was substituted by the Court of Criminal Appeal on March 23, 1959. On September 30, 1959, the appellant was convicted at Hertfordshire Quarter Sessions of housebreaking and larceny and a second probation order for three years was made. On January 5, 1960, the appellant was convicted at East Sussex Quarter Sessions of housebreaking and larceny and of obtaining property by false pretences and was sentenced to eighteen months' imprisonment. He was brought back to Hertfordshire Quarter Sessions on February 8, 1960, in respect of the breach of the second probation order and was sentenced to twelve

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months' imprisonment for the offence for which he had originally appeared at those sessions. On February 12, 1960, he was brought back to Oxford City Quarter Sessions in respect of the breach of the probation order made by the Court of Criminal Appeal and was then sentenced to seven years' preventive detention for the original offence.

Gordon Hardy for the appellant. The probation order made by the Court of Criminal Appeal ceased to have effect at the time when the second probation order was made. There cannot be two effective probation orders in force at the same time: R. *v.* HAVANT JUSTICES, *ex p.* JACOBS (1957) 41 Cr. App.R. 621; [1957] 1 W.L.R. 365. The whole scheme of the Criminal Justice Act, 1948, points to the fact that a probationer could not be under supervision in two districts by two different probation officers at the same time. The only effective probation order in force at the material time was the order made at Hertfordshire Quarter Sessions and in respect of the breach of that order the appellant had already been dealt with at those sessions when he appeared to receive sentence at Oxford. The Recorder of Oxford had, therefore, no jurisdiction to deal with the appellant in respect of the original offence.

Peter Crawford, for the Crown, was not called on to argue.

THE LORD CHIEF JUSTICE: This appellant, on February 12, 1960, was sentenced to seven years' preventive detention for breach of a probation order. If ever a man merited that sentence, it is this man, and the court feels that it is unnecessary to go into his previous convictions. It is enough to say that he has had many chances to pull himself together and has failed to do so.

The appeal, which is by leave of the court, concerns a purely technical matter. It arises in this way: On November 28, 1958, he was convicted at Oxford City Quarter Sessions of housebreaking and larceny, and was sentenced to eight years' preventive detention. On March 23, 1959, this court substituted a probation order for three years in very special circumstances, one of which was that the appellant's employer came before the court and in effect said: "I can look after this man," and the court in those circumstances gave the appellant every opportunity. Despite that, on September 30, 1959, he was again convicted at Hertfordshire Quarter Sessions of housebreaking and larceny, and that court put him on probation, under another probation order, for three years. Notwithstanding that, on January 5, 1960, he appeared before the East Sussex Quarter Sessions, when he was convicted again of housebreaking and larceny and also this time of false pretences, and he was sentenced to eighteen months' imprisonment. Prima facie, that conviction was a breach of both probation orders, that is, the probation order made by this court, which is deemed to be a probation order made by the Oxford City Quarter Sessions, and also a breach of the probation order made at the Hertfordshire Quarter Sessions. He was duly brought back before the Hertfordshire Quarter Sessions, when he received twelve months' imprisonment in respect of breach of the probation order. Four days later he was brought before the Oxford City Quarter Sessions, when the Recorder imposed the sentence now under appeal of seven years' preventive detention in respect of breach of the order of this court, which was deemed to be an order made by the Oxford City Quarter Sessions.

The sole point in the appeal is whether the original probation order made by Oxford City Quarter Sessions was still effective and alive once the Hertfordshire Quarter Sessions had imposed a second probation order for three years. Mr. Hardy, who has urged all that is possible for the appellant, points out what I think is quite clear, that under the scheme of the Criminal Justice Act, 1948, a man could not be under supervision in two districts by two different probation officers. Accordingly, so far as supervision at any rate is concerned, and to that presumably would have to be added any particular conditions or requirements of the respective orders, the only effective order would be the second one, that is, that made by Hertfordshire Quarter Sessions, but that is a long way from saying that the original probation order has become ineffective for all purposes. If it were, it is to be observed that a prisoner would go unsentenced, unpunished, for the original offence, the subject of the first probation order. It would mean that the statement made to every prisoner pursuant to section 3 (5) of the Criminal Justice Act, 1948, that if he commits another offence he will be sentenced for the original offence, is of no effect at all. Prima facie, therefore, it seems to this court that, though the original probation order may be ineffective for supervision purposes, it should remain of full effect to enable the court to impose a punishment for the original offence.

Reference has been made to R. *v.* HAVANT JUSTICES, *ex p.* JACOBS (1957) 41 Cr.App.R. 62; [1957] 1 W.L.R. 365. It is unnecessary to go into the facts of that case save to say that the two probation orders in that case were for one and the same offence; in other words, the court had made a probation order in respect of an offence, there was a breach of that probation order and, the accused person being brought up to be punished for the original offence, a second probation order was made. In those circumstances, the Divisional Court held that, once the second probation order had been made, the previous probation order could be no longer of effect. It is to be observed that they did not say that it had become ineffective for all purposes, but whether that was intended or not, the facts there were quite different, because there the prisoner was being brought up and punished under the second probation order for the original offence. If the argument here prevails, the prisoner would go unpunished for the original offence. In the judgment of this court, the original probation order remained effective for the purpose of the appellant being brought back and punished for the original offence. Accordingly, the Recorder was fully justified in imposing the sentence he did, and this appeal must be dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, Mr. JUSTICE GORMAN
AND Mr. JUSTICE ASHWORTH

WALTER GEOFFREY JAMES BROWN

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Evidence—Character of Prisoner—Cross-Examination on Previous Conviction—Imputation on Character of Prosecutor—Charge of Inflicting Grievous Bodily Harm—Defence of Self-Defence—Suggestions Put to Prosecutor that he was the Aggressor and was Driving when under the Influence of Drink—Criminal Evidence Act, 1898 (62 *&* 63 *Vict. c.* 36), *s.* 1 (*f*), *exception* (*ii*).

The appellant was charged with maliciously inflicting grievous bodily harm. At the trial he put forward the defence of self-defence and it was suggested to the prosecutor in cross-examination that he was the aggressor and that he had at the time been driving a motor-car when under the influence of drink and erratically in other respects. When the appellant gave evidence, the judge, after hearing argument, ruled that the nature of the defence involved an imputation on the character of the prosecutor within the meaning of exception (ii) in the proviso to section 1 (*f*) of the Criminal Evidence Act, 1898, and gave leave to prosecuting counsel to cross-examine the appellant on a previous conviction.

Held, that the ruling was right, as defending counsel had gone much further in cross-examination than merely developing the defence of self-defence and that the judge had properly exercised his discretion.

Cook (1959) 43 Cr.App.R. 138; [1959] 2 W.L.R. 616 followed.

Appeal against conviction.

The appellant was convicted at Hertfordshire Quarter Sessions on February 8, 1960, of maliciously inflicting grievous bodily harm and was sentenced by the Deputy-Chairman (Harold Cassel, Esq.) to twelve months' imprisonment.

A man named Wright had gone to a public-house at Stevenage at 10.15 p.m. and, finding that a neighbour of his was there who appeared to be the worse for drink, decided as an act of kindness to drive him home. During the journey the

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van which Wright was driving collided with a car in which the appellant was a passenger. An argument ensued during which the appellant hit Wright in the mouth, butted him with his head, and seriously injured him. At the trial the appellant put forward the defence of self-defence, and it was suggested to Wright in cross-examination by defending counsel that he was the aggressor and was drunk, that his driving was disgraceful, and that when cars passed he shouted abuse. In particular he was asked: " And when the car behind you hooted to try and get by you deliberately stayed longer and stopped in the middle of the road? " Wright denied all the allegations. The Deputy-Chairman, after hearing argument in the absence of the jury, ruled that the nature of the appellant's defence was " such as to involve imputations on the character of the prosecutor " within the meaning of exception (ii) in the proviso to section 1 (*f*) of the Criminal Evidence Act, 1898, and that, in the exercise of his discretion, he would permit prosecuting counsel to cross-examine the appellant on a previous conviction. The appellant was thereupon asked about, and admitted, a recent previous conviction of violence.

Gordon Hardy for the appellant. The Deputy-Chairman was wrong in admitting cross-examination of the appellant on the previous conviction, as the nature or conduct of the defence did not involve an imputation on the character of the prosecutor within exception (ii) in section 1 (*f*) of the Criminal Evidence Act, 1898. Here the appellant was doing no more than developing the defence of self-defence in the questions put on his behalf to the prosecutor, and according to the decision of the House of Lords in STIRLAND *v.* D.P.P. (1944) 30 Cr.App.R. 40; [1944] A.C. 315 he was entitled to do this without rendering himself liable to such cross-examination. It is true that in later decisions, especially JENKINS (1945) 31 Cr.App.R. 1 and COOK (1959) 43 Cr.App.R. 138; [1959] 2 W.L.R. 616, the angle of approach to the interpretation of the statute has been somewhat different and a stricter view has prevailed, but it is submitted that an accused person is merely developing his defence and not making imputations on the character of the prosecutor or a Crown witness as long as questions directed in cross-examination to such a witness are confined to the circumstances of the alleged offence and do not attack the witness's general character. If it had been suggested to the prosecutor in the present case that he was a violent man generally or had been violent on other occasions, that would have let in the appellant's character, but here the suggestions of violence on behalf of the prosecutor were confined to the actual incident in which it was alleged that he was the aggressor and that the appellant was acting only in self-defence. Further, no warning was given to the appellant by the court of the danger into which he was running by the line of cross-examination which was being followed, and COOK (*supra*) is an authority for the proposition that such warning is essential.

Roger Frisby for the Crown. All the authorities relating to this subject were reviewed in the recent case of COOK (*supra*) and it is now quite clear that the words of the statute should be given their plain and ordinary meaning and that no attempt should be made to read into them words such as " other than for the purpose of developing the defence " or other words beneficial to the accused person. It was also made clear that if there has been an imputation on the character of the prosecutor or a Crown witness according to this strict interpretation, the presiding judge still has a discretion whether to allow the accused person to be cross-examined on previous convictions or not. Here, there was clearly an imputation on the character of the prosecutor. The suggestions put to the prosecutor in cross-examination went far beyond the suggestion that he was the aggressor in the incident which led to his being injured. It was suggested to him that he was driving a motor-vehicle when under the influence of drink and in an outrageous manner. In the circumstances the Deputy-Chairman was fully justified in exercising his discretion to permit cross-examination of the appellant on a previous conviction of violence, and it is submitted that this court should not interfere with the exercise of that discretion. The warning referred to in COOK (*supra*) may

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be very necessary where a prisoner is undefended or where his counsel is not fully alive to the danger arising from his line of cross-examination, but was not necessary in the present case.

THE LORD CHIEF JUSTICE: This appellant was convicted at Hertfordshire Quarter Sessions of maliciously inflicting grievous bodily harm, and was sentenced to twelve months' imprisonment. He now appeals against that conviction by leave of the court. The point which the court had in mind when giving leave was whether the Deputy-Chairman acted properly in admitting, as he did, evidence of a previous conviction of the appellant only three months before for assault occasioning actual bodily harm.

The short facts were these: A Mr. Wright, who had spent the evening repairing television sets in Stevenage, went across at 10.15 p.m. to a public-house where he had a glass of beer. His story was that a neighbour of his was there, who was so drunk that Mr. Wright, as an act of kindness, thought he had better drive him home in his van. On the drive home the van came into collision with a car in which the appellant was a passenger. An argument ensued, and the appellant hit Mr. Wright in the mouth with his fist, and was guilty of that very nasty act of butting him or nutting him with his head. The result was that Mr. Wright lost consciousness and suffered quite serious injuries.

The case which the appellant sought to develop at the trial was that Mr. Wright had been the aggressor, that all he, the appellant, did was to hit him in self-defence. After Mr. Wright had been cross-examined and after the appellant had given his evidence-in-chief, the Deputy-Chairman turned to counsel for the prosecution and said this: " Mr. Frisby, if you have an application to make, subject to what Mr. Llewellyn [defending counsel] may say, I should consider it." The jury left the court, and an argument took place on the question whether from the cross-examination of Mr. Wright and the evidence of the appellant it was a case for the appellant's previous conviction being brought to the notice of the court. After hearing argument, the Deputy-Chairman said this: " In my view, the defendant has brought himself within the section as a matter of law, and as a matter of discretion I shall exercise it in favour of the prosecution by saying that the questions shall be asked which Mr. Frisby wishes to ask." Thereupon, evidence of this conviction three months before for violence was given.

This whole question has come before this court quite recently in COOK (1959) 43 Cr.App.R. 138; [1959] 2 W.L.R. 616. It was there pointed out that the subsection in question, that is, subsection 1 (*f*) of the Criminal Evidence Act, 1898, has clearly permitted the introduction of the prisoner's previous convictions only in exceptional cases; and that, if the matter were looked at strictly, it would be impossible for a prisoner charged with assault to assert that the prosecutor struck him first without imputing bad character and, indeed, the commission of a crime. Devlin J., as he then was, in giving the judgment of the court, went through a number of the cases on the matter. He pointed out that in some of the earlier cases, for instance PRESTON'S CASE (1909) 2 Cr.App.R. 24; [1909] 1 K.B. 568, an attempt was made by the court to restrict the plain meaning of the words of the statute in order to ensure that a prisoner's conviction should be referred to only exceptionally and that he should not be hampered in developing his defence. He went on to refer to the later cases where the matter was dealt with in general as a matter of discretion. Then he said this ((1959) 43 Cr.App.R. at p. 145): " In our opinion, the difficulties created by this subsection are as a general rule best dealt with in accordance with the principle in HUDSON (1912) 7 Cr.App.R. 256; [1912] 2 K.B. 464 as applied in JENKINS (1945) 31 Cr.App.R. 1. The attempt to give the words a limited construction has led to decisions which it is difficult to reconcile; now that it is clearly established that the trial judge has a discretion and that he must exercise it so as to secure that the defence is not unfairly prejudiced, there is nothing to be gained by seeking to strain the words of the subsection in favour of the defence."

In the present case the court is clear that the case comes within the subsection. The material words are: "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged . . . unless . . . (ii) the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution. . . ." Here, this defence of self-defence was of such a nature as to involve imputations on the character of the prosecutor, and therefore the matter came within the words of the subsection and it became a matter of discretion.

Reverting to COOK's case, Devlin J. said ((1959) 43 Cr.App. R. at p. 147): "The issue therefore becomes one of discretion. It is well settled that this court will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision." In the present case undoubtedly the Deputy-Chairman was faced with the situation where the appellant was asserting this defence of self-defence, maintaining that Mr. Wright was the aggressor acting under the influence of drink. No doubt, the fact that he was discovered driving the car with a passenger who was admittedly drunk gave rise to that line of cross-examination. The matter, however, went much further than that, because it was suggested not only that he had spent very much longer in the public-house than he had said, but that he was quite drunk, that his driving of the car was disgraceful and that when the cars passed he shouted abuse. Particularly he was asked: "And when the car behind you hooted to try and get by you deliberately stayed longer and stopped in the middle of the road? (*A*) No, there is no necessity to stop for any of those turnings on that estate." It seems to this court that in that line of cross-examination counsel was going much further than merely developing the

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defence of self-defence. He was suggesting that the prosecutor was drunk in charge of a car. In those circumstances the court thinks that there was ground upon which the Deputy-Chairman could admit the evidence of his previous conviction and, that being so, this court will not interfere.

There is one other matter to be referred to, and that is that in COOK'S CASE (1959) 43 Cr.App.R. at p. 147 this was said: " Finally, Mr. Blaker "—who was appearing for the appellant in that case—" made the substantial point that no warning was given to the accused before his convictions were put to him. In cases of this sort where there is no hard and fast rule, some warning to the defence that it is going too far is of great importance; and it has always been the practice for prosecuting counsel to indicate in advance that he is going to claim his rights under the subsection or for the judge to give the defence a caution. This is especially needful when the prisoner, as here, was not represented, though it is fair to say that he professed familiarity with the law and rejected the legal aid that had been assigned to him." The court desires to say nothing which will be thought to encourage a departure from that practice. It is only thus that in general it can be ensured that a prisoner is not taken by surprise. In the present case, however, the appellant was represented by very experienced counsel and it cannot be suggested that the absence of a warning was in any way unfair.

For those reasons this court feels that there is no ground for interfering with the discretion exercised by the Deputy-Chairman, and this appeal is dismissed.

Appeal dismissed.

Solicitors: Brignall, White & Orchard, Stevenage, for the Crown.

BEFORE

MR. JUSTICE BYRNE, MR. JUSTICE SACHS AND
MR. JUSTICE WINN

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WILLIAM NICHOLLS

Indictment — Duplicity — Two Separate Offences Charged in one Count — Warehousebreaking and Larceny and Warehousebreaking with Intent—Verdict of Guilty of Warehousebreaking —Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *ss.* 26 (1), 27 (2).

The appellant was convicted on an indictment in which the Statement of Offence was " Warehousebreaking, contrary to ss. 26 (1) and 27 (2) of the Larceny Act, 1916," and the Particulars of Offence alleged that the appellant broke and entered the warehouse with intent to steal therein and stole therein certain property.

Held, that the indictment was bad for duplicity in that it charged two separate offences, the maximum punishment for each of which was different, in one count; and, the jury having returned a verdict of " guilty of warehousebreaking," the conviction must be quashed.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on February 12, 1960, of warehousebreaking and was sentenced to three years' imprisonment.

The indictment was in the following terms : " Statement of Offence : Warehousebreaking, contrary to sections 26 (1) and 27 (2) of the Larceny Act, 1916. Particulars of Offence : William Nicholls, on the 11th day of January, 1960, in the county of Middlesex, broke and entered a warehouse at Bridport Road, Edmonton, with intent to steal therein and stole therein twenty-two overcoats, the property of the Dunlop Clothing and Waterproof Co., Ltd." The verdict of the jury was taken in this form : " Members of the jury, are you agreed upon your verdict ? (The foreman) : We are. (The clerk of the court) : Do you find the prisoner, William Nicholls, Guilty or Not Guilty of warehousebreaking on this indictment ? (The foreman) : Guilty."

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J. E. Pullinger for the appellant. The indictment was bad for duplicity. Two separate offences, under different sections of the Larceny Act, 1916, were charged in one count. [He referred to Archbold's *Criminal Pleading, etc.*, 34th ed., § 1826.]

H. J. Leonard for the Crown. The form of indictment used in this case has often been used at the Central Criminal Court and is analogous to the indictment for burglary and larceny, which is unquestionably valid. It is conceded that a difficulty does arise from the fact that the jury returned a verdict of guilty of warehousebreaking.

BYRNE J. This appellant was at the Central Criminal Court charged upon an indictment which was framed in this way: Statement of Offence: Warehousebreaking, contrary to sections 26 (1) and 27 (2) of the Larceny Act, 1916, and the Particulars of Offence alleged that on January 11, 1960, the appellant broke and entered a warehouse at Bridport Road, Edmonton, with intent to steal therein and stole therein twenty-two overcoats, the property of the Dunlop Clothing and Waterproof Co., Ltd. The verdict of the jury was taken in this form: "Members of the jury, are you agreed upon your verdict? (The foreman of the jury): We are. (The clerk of the court): Do you find the prisoner, William Nicholls, Guilty or Not Guilty of warehousebreaking on this indictment? (The foreman of the jury): Guilty." Now the first thing that is to be said about this matter is this. The maximum penalty for breaking and entering a warehouse and stealing is fourteen years; the maximum penalty for breaking and entering a warehouse with intent to steal is seven years, and thus it would be obviously of great importance to know what the verdict of the jury really meant. It is quite plain, on looking at this record, that no one could ascertain whether the jury had in fact convicted the appellant of an offence which would carry a maximum punishment of fourteen years or an offence which would carry a maximum punishment of seven years. These sections, 26 (1) and 27 (2), are separate and distinct sections of the Larceny Act, 1916, and it seems to this court that this

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is obviously a case of duplicity. If this charge had in fact been dealt with in this indictment in two separate counts, the matter would have been plain and the verdict returned would have indicated quite plainly the finding of the jury, but as it is, these two sections of the statute have been linked together and the appellant was in one count of this indictment charged with two separate offences.

In the opinion of this court this indictment was bad for duplicity and that means that this appeal must be allowed and the conviction quashed.

Conviction quashed.

Solicitor: The Solicitor, Metropolitan Police, for the Crown.

BEFORE

MR. JUSTICE BYRNE, MR. JUSTICE SACHS AND
MR. JUSTICE WINN

1960
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CLIFFORD WALTER WAINWRIGHT

Larceny—Bailee—Representative of Company Entrusted with Company's Goods—Goods to be Sold for Benefit of Company at Fixed Price—Sale by Representative at Own Price for Own Benefit—Act Inconsistent with Purposes of Bailment—Larceny Act, 1916 (6 *&* 7 *Geo*. 5, *c*. 50), *s*. 1 (1).

The appellant, the representative of a company, was entrusted with two articles belonging to the company with instructions to sell them on the company's behalf at fixed retail prices. He dishonestly sold the articles at his own prices and for his own benefit and retained the proceeds for himself.

Held, that the appellant was properly convicted of larceny as a bailee.

Henderson (1870) 11 Cox 953 and Richmond (1873) 12 Cox 495 followed.

Brackett (1850) 4 Cox 274 not followed.

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Appeal against conviction.

The appellant was convicted at Bradford Quarter Sessions on January 14, 1960, of larceny and was sentenced by the Recorder (Bernard Gillis, Esq., Q.C.) to twelve months' imprisonment.

On September 8, 1959, the appellant, who was a representative of Broadmead Wireless Co., Ltd., was given a wireless set and, on September 30, a refrigerator with instructions from the company to dispose of the articles on their behalf at retail prices of £21 and £68 respectively. On October 9 he sold the articles for a total of £42 to a person who was subsequently convicted of receiving them. There was no dispute that the appellant's intention throughout had been to keep the proceeds for himself and this was what he had done. After the sale he delivered to the company two false documents purporting to be hire-purchase agreements relating to the articles.

James Pickles for the appellant. To constitute the offence of larceny by a bailee, the bailee must have done something inconsistent with the purposes of the bailment. The appellant had been charged with the duty of selling the articles; this he did, and his subsequent actions were irrelevant. In BRACKETT (1850) 4 Cox 274 the defendant was acquitted on facts which are indistinguishable from those of the present case. [He referred also to HENDERSON (1870) 11 Cox 953 and RICHMOND (1873) 12 Cox 495.] Had the charge been one of fraudulent conversion of the proceeds of sale, it is difficult to see what answer the appellant could have had, but the Crown preferred to charge the appellant with larceny as a bailee.

J. Stanley Snowden, for the Crown, was not called on to argue.

BYRNE J. The appellant was convicted before the Recorder and a jury at Bradford Quarter Sessions of simple larceny of a wireless set and a refrigerator. He was originally indicted for larceny as a servant, but at the end of the case for the prosecution Mr. Pickles, who then also appeared for the appellant, submitted that there was no evidence that the appellant was a servant. The Recorder upheld that submission and the case then proceeded on the basis of a charge of simple larceny. Mr. Pickles also submitted that there was no evidence of larceny to go to the jury. That submission was rejected by the Recorder, and the case proceeded and resulted in a conviction and the appellant now appeals against that conviction.

The facts can be stated quite shortly. The appellant was the outside representative of a company and his duty was to sell the company's property on credit or on hire purchase. On September 8, 1959, he was entrusted by his employers with the wireless set for the purpose of selling it. The price was to be £21, if the set was sold for cash, and a higher figure if it became the subject of a hire-purchase agreement. On September 30 he was entrusted by his employers with a refrigerator for the purposes of sale, the cash price to be £68. There was no evidence that the appellant was forbidden to vary prices, but, in the opinion of the court, it is quite obvious that it was implicit in the situation that the articles could be sold only at the prices which his employers had fixed. On October 9, the appellant sold both the wireless set and the refrigerator to a man named Lester for £42 in cash. Lester was charged with receiving the stolen property and was convicted.

Mr. Pickles, in the course of his argument, said that he conceded that the appellant intended to keep the money and in fact kept it, and that it would have been impossible to answer a charge of fraudulent conversion of the money, but his submission is that, in the circumstances of this case, the appellant should not have been convicted of larceny. In the consideration of this case one has to apply the definition in the proviso to section 1 (1) of the Larceny Act, 1916, the relevant words of which are: " A person may be guilty of stealing . . . notwithstanding that he has lawful possession [of goods] if, being a bailee . . . thereof, he fraudulently converts the same to his own use. . . ." It is, in our opinion, of considerable importance to observe what happened after the

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appellant sold these articles for £42. Two hire-purchase agreements came into existence, one in respect of each article. The hire-purchase agreement in respect of the wireless set purported to be signed by somebody named Smith, and the other in respect of the refrigerator by somebody named Brooks, and the forms were sent by the appellant to his employers.

Our attention has been drawn to BRACKETT (1850) 4 Cox 274. This was a case tried by the Common Serjeant and the facts were: " The prisoner was indicted for stealing a pair of trousers, the property of his master. The evidence showed that the prosecutor was a tailor: the prisoner was in his service as clerk and shopman, and it was his duty to sell his master's goods at the price marked upon them; he had no authority to take less; the trousers mentioned in the indictment were ticketed at 15s., but he sold them to a witness for 10s., which money he had kept." After referring to the arguments of counsel, the report proceeds: " The Common Serjeant was of opinion that the facts did not constitute a larceny. On consulting Wightman J., the learned judge agreed with him, and the prisoner was acquitted." We think it is sufficient for the purposes of this judgment to say that that case was decided in 1850, that is to say, eleven years before the Larceny Act, 1861, which contained the provision with regard to larceny as a bailee which was afterwards put into the consolidating Act of 1916. In the opinion of this court, the test to be applied to the consideration of the facts in the present case is that the appellant was entrusted with articles by his employers in order to sell them for the benefit of his employers. The evidence conclusively established that he sold those articles, not for the benefit of his employers, but for his own benefit, and that, in the opinion of this court, amounts to larceny as a bailee.

The view which we take of this case is borne out by what was said in another case to which we have been referred—HENDERSON (1870) 11 Cox 593. According to the headnote, the facts were: " A. delivered two brooches to the prisoner to sell for him at £200 for one and £115 for the other, and the prisoner was to have them for a week for that purpose; but two or three days' grace might be allowed. After ten days had elapsed, the prisoner sold them, with other jewellery, for £250, but arranged with the vendee that he might redeem the purchase for £110 before September. *Held*, that this amounted to a fraudulent conversion of the brooches to his own use by a bailee "within the Larceny Act, 1861." Kelly C.B., in his judgment, said this (at p. 596): "The second question left to the jury was, did the prisoner intend, at the time of his raising the money on the brooches, to resume possession of them, so as to fulfil the purpose for which they were entrusted to him, *i.e.*, return them in specie to the prosecutor? If he did not, the act was fraudulent." Applying that test, it seems to this court that this plainly was a case in which the appellant was dealing with property in terms which were completely at variance with the terms which existed when the bailment was created and he was not dealing with the property for the benefit of his employers, but for his own benefit.

Another case which was brought to our attention was Richmond (1873) 12 Cox 495. The facts, according to the headnote, were: "A traveller was entrusted with pieces of silk (about ninety-five yards each) to carry about with him for sale to such customers as he might procure. It was his duty to send by the next post after sale the names and addresses of the customers to whom any might have been sold, and the numbers, quantities and prices of the silk sold. All the goods not so accounted for remained in his hands, and were counted by his employers as stock. At the end of each half year it was his duty to send in an account of the entire six months, and to return the unsold silk. He was paid by commission. Within six months after four pieces of silk had been delivered to him, the prisoner rendered an account of the same, and entered them as sold to two persons, with instructions to his employers to send the invoices to the alleged customers. It turned out that this was false, and that he had appropriated the silk to his own use." Kelly C.B. said, in his judgment (at p. 497): "All that is said about the six months in the Case is, 'the prisoner paid his own travelling expenses, and at the end of each half year

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it was his duty to send in an account for the entire six months, and to return the unsold silk.' But here, a short time after receiving the silk, the prisoner rendered an account in which he had entered as having sold to two persons, whose names and addresses were there stated, the four pieces of silk, with instructions to send invoices to them, and which was all a fabrication. How can it be said that he was not a bailee of the silk at the time and that this was not larceny by a bailee?" Blackburn J., in his judgment, said (at p. 497): "The prisoner was bailee of the silk from the moment he received it from his employers. The silk was not his, but theirs; and he was not authorised to dispose of it for his own private use."

It seems to this court that those facts coincide with the facts with which we are dealing in the present case, and the Recorder, in his summing-up, dealt quite adequately with the law with regard to this matter. In those circumstances this appeal is dismissed.

Appeal dismissed.

Solicitor: Town Clerk, Bradford, for the Crown.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DONOVAN AND MR. JUSTICE DAVIES

ROGERS *v.* ARNOTT

1960
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Larceny—Bailee—Conversion—Attempted Sale of Property Entrusted—Bailee Exercising Right of Owner—Full Offence of Larceny then Complete—Conviction for Attempted Larceny only Wrong—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 1 (1).

Where a bailee has dishonestly either sold or attempted to sell goods entrusted to him contrary to the terms of the bailment and for his own benefit, he is guilty of the full offence of larceny in either case; in the latter case a conviction of attempted larceny only is wrong, because the conversion is complete, as when the bailee has formed the intention of selling for his own benefit and proceeds to carry out that intention by offering the property for sale, he is standing in the owner's shoes in relation to the property and exercising an owner's rights.

Quaere, whether where in the case of an attempted sale in such circumstances the bailee has been charged with attempted larceny and acquitted on the ground that the full offence of larceny has been established, he can afterwards be prosecuted for larceny.

Case stated by an alderman of the City of London.

An information was preferred at Guildhall Magistrates' Court by the appellant, Henry Rogers, a constable in the City of London Police, charging the respondent, David George Metcalfe Arnott, with attempted larceny of a tape recorder of the value of £54.

The recorder belonged to one F. R. Kelly and was the subject of a hire-purchase agreement between Kelly and one Wayment. At the time of the alleged offence the recorder was in the possession of the respondent, having been lent to him by one White, who shared a flat with Wayment. On June 19, 1959, the appellant, having received certain information, met the respondent by arrangement and went with him to a car park in Warwick Lane. There the respondent produced the recorder, demonstrated it and offered to sell it to the appellant for £25. The appellant then disclosed the fact that he was a police officer and arrested the respondent.

It was contended on behalf of the respondent that, at the time of the attempted sale, there had already been an asportation of the recorder, and therefore the full offence of larceny was completed; and that, accordingly, he could not be convicted of the crime actually charged, namely, attempted larceny. It was contended on behalf of the appellant that the case was one of attempted conversion by a bailee, which was incomplete because the sale was not yet concluded, and that the respondent was, therefore, properly charged with attempted larceny.

The alderman was of opinion that at the time of the attempted sale the respondent had already stolen the recorder and that, therefore, he was not guilty of a mere attempt. He accordingly dismissed the information.

The prosecutor appealed.

Miss A. M. Jennings for the appellant.

Basil Wigoder for the respondent.

May 17. The following judgments were read:

THE LORD CHIEF JUSTICE: Donovan J. will give the first judgment.

DONOVAN J.: This is an appeal by way of case stated from a decision of Alderman Sir Seymour Howard sitting at Guildhall, London.

The appellant, a constable in the City of London Police, preferred a charge against the respondent of attempting to steal a tape recorder, valued at £54 odd, on June 19, 1959, at a car park in the City of London. The recorder in question belonged to a Mr. F. R. Kelly, and was the subject of a hire-purchase agreement between Mr. Kelly and one Wayment. At the time of the alleged offence the recorder was in the possession of the respondent, it having been lent to him by one White. How White came to possess it the case does not explain. It simply says that White at one time shared a flat with Wayment. One must assume for the purpose of this case that White had lawfully obtained possession and had lawfully lent the recorder to the respondent. The latter thus became a bailee of the article. On June 19 the appellant, having received certain information, met the respondent by arrangement and went with him to a car park in Warwick Lane. There the respondent produced the recorder, demonstrated it and offered to sell it to the appellant for £25. The appellant then disclosed that he was a police officer and arrested the respondent.

At the hearing of the charge the respondent contended that at the time of the attempted sale there had already been asportation of the recorder, and therefore the full offence of larceny had been committed; and that, accordingly, he could not be convicted of the crime actually charged, namely, an attempt to steal. The appellant, on the other hand, said that the case was one of attempted conversion by a bailee which was incomplete because the sale was not concluded; the respondent was therefore properly charged with attempted larceny.

The magistrate found that at the time of the attempted sale the respondent had already stolen the tape recorder, and he was, therefore, not guilty of a mere attempt. No reasons are given in the case for the conclusion that the recorder had already been stolen at the time of the attempted sale.

The proviso to section 1 (1) of the Larceny Act, 1916, reproducing with immaterial modifications section 4 of the Punishment of Frauds Act, 1857 (rep.), enacts that: "A person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part-owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner." It is contended by the appellant that there was no such fraudulent conversion in the present case, but simply an attempt at it, because in the events which happened the true owner was deprived of nothing, and, as in the case of the civil tort of conversion, some detriment to the owner is essential to the commission of the wrong. I think the proposition is doubtful and the analogy in any event misleading. Conversion *per se* has been defined in a civil action as an act intentionally done inconsistent with the owner's right. (See Lord Porter's speech in CAXTON PUBLISHING CO. *v.* SUTHERLAND PUBLISHING CO. [1939] A.C. 178, at p. 202.) The analogy is misleading, because no civil action is possible unless the true owner has suffered damage; but this is not so in the case of a criminal prosecution for fraudulent conversion. One cannot, therefore, determine for the purpose of the criminal law whether there has been a conversion simply by asking whether the true owner has suffered damage. He might indeed recover the article intact, but this would not of itself prevent a prosecution of the dishonest bailee. The respondent contends that there was a fraudulent conversion here when the respondent, having dishonestly assumed to himself the rights of ownership in the property, endeavoured to exercise it by offering the property for sale.

There appears to be no reported judicial decision directly in point. In JACKSON (1864) 9 Cox 505 the prisoner, who borrowed a coat for one day and was later found with it on board a ship bound for Australia, was held not to have converted the coat to his own use. For this to have happened, said Martin B., there must be some act inconsistent with the purpose of the bailment, and he took the view that there was no evidence of such an act in the case. The purpose of the bailment was, presumably, that the bailee might wear the coat, and the learned judge was apparently of opinion that having the coat on board the ship was not sufficient evidence of conversion.

In REEVES (1859) 5 Jur.(N.S.) 716, the prosecutor, who was lying tipsy on the ground, saw the prisoner, a friend of his, remove his, the prosecutor's, watch from his pocket. He made no protest, thinking the prisoner was doing it from friendly motives. The prisoner then went and offered the watch for sale, but afterwards denied having taken it. It was held that on those facts there was a bailment of the watch and evidence for the jury of a fraudulent conversion within the meaning of section 4 of the Punishment of Frauds Act, 1857. The jury, however, acquitted the prisoner. But for the denial of ever having taken the watch, the case is very like the present.

In WAKEMAN (1912) 8 Cr.App.R. 18, it was said by this court that a refusal to return to the owner on demand by him the thing bailed might be evidence of fraudulent conversion; and in PRICE (1913) 9 Cr.App.R. 15, where a pony was sold by a man who had simply hired it, Avory J. said that such a sale prima facie constituted conversion.

So far as the textbooks are concerned, paragraph 245 of the

16th edition of Kenny's *Outlines of Criminal Law* contains this passage: "Exactly what constitutes the 'conversion,' which involves the bailee in the guilt of stealing, has not been authoritatively stated. The prisoner must have possession of the goods, otherwise he would not be bailee, and then, as it would seem, any conduct on his part which shows that he assumes either the full title of ownership in the goods, or asserts a right to pass the full title of ownership, will amount to such conversion as will render him guilty of stealing them within the statute." The 16th edition of *Russell on Crime*, by the same author, at p. 1095, has this to say upon the subject: "It is unfortunate that the term 'conversion' does not appear to have been given a precise definition either judicially or in the textbooks. But for the purposes of the law of larceny it is submitted that it is necessary that the offender should have possession of the goods, and that when possession has been obtained any setting up by the offender of a full title to the property in himself, adverse to that of the owner, if done without a bona fide claim of right, will render him guilty of larceny."

It would be rash, I think, to attempt a definition of the term "converts to his own use" which would cover every possible case. A sale of the property by the bailee, contrary to the terms of the bailment, and for his own benefit, is clearly such a conversion. The reason is that the bailee in such a case has usurped the rights of the owner for his, the bailee's benefit. Is the position any different in the case of an attempted sale? I think not. If I am lent property, and then determine in my own mind to sell it for my own benefit contrary to the terms of the bailment, I have determined that in relation to the property I will no longer be a borrower but an owner, and an owner who wishes to sell. When I proceed to carry that intention into effect by offering the property for sale, I am standing in the owner's shoes in relation to that property and exercising an owner's right. In these circumstances I have, in my view, already converted the property to my own use whether the attempted sale takes place or not; and if I have acted dishonestly in the matter, as the respondent

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here is found to have done, then the offence of larceny is committed. In short, I agree with the learned author of *Kenny* and *Russell* in his view upon this point.

It is a little strange, perhaps, if the appellant should succeed on the grounds that he has committed the full offence and not merely attempted it, and it is said for him that in these circumstances he cannot be tried for the full offence. I express no opinion upon that. The point is not raised in the case, and may yet arise for decision. In the meantime I would dismiss this appeal.

DAVIES J.: I entirely agree with the judgment which my Lord has just delivered.

THE LORD CHIEF JUSTICE: I agree and have nothing to add.

Appeal dismissed.

Solicitors: the Comptroller and City Solicitor, for the appellant; A. W. Kemp, for the respondent.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STABLE,
MR. JUSTICE DONOVAN, MR. JUSTICE ASHWORTH AND
MR. JUSTICE SALMON

JACK DENNIS McVITIE

1960
May 9: 23

Indictment—Possessing Explosives—Word "Knowingly" Omitted from Particulars of Offence—Indictment Defective but not Bad in Law—Indictments Act, 1915 (5 *&* 6 *Geo.* 5, *c.* 90), *s.* 3, *Sched. I*, *r.* 4 (3), (4).

Proviso—No Substantial Miscarriage of Justice—Technical Defect in Indictment—No Embarrassment or Prejudice to Prisoner—Unfettered Discretion of Court—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (1).

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The appellant was charged on an indictment, count one of which charged as the Statement of Offence " Possessing Explosives, contrary to section 4 (1) of the Explosive Substances Act, 1883 " and the Particulars of Offence, omitting the word " knowingly," alleged that the appellant had in his possession an explosive substance " under such circumstances as to give rise to a reasonable suspicion that it was not in [his] possession for a lawful object." During the trial the appellant admitted that he knew the substance was in his possession and was explosive.

Held, that the indictment was not, by reason of the omission of the word " knowingly," rendered bad in law in the sense of disclosing no offence known to the law, but merely defective in that it described a known offence with incomplete particulars.

STEWART AND HARRIS, *ante*, p. 29 referred to.

Held, in the circumstances set out above, that as the appellant had not been embarrassed or prejudiced by the technical irregularity the court was not prevented from applying the proviso by any fetter on its discretion arising out of any of its previous decisions and that in the circumstances the court would apply the proviso.

HYDE (1934) 24 Cr.App.R. 149 is not to be regarded as an authority limiting the court's discretion in this respect.

THOMPSON (1913) 9 Cr.App.R. 252; [1914] 2 K.B. 99 followed and applied.

Appeal against conviction.

The appellant was convicted at Cambridgeshire Quarter Sessions on April 3, 1959, of possessing explosives, contrary to section 4 (1) of the Explosive Substances Act, 1883, and was sentenced by the Chairman (His Honour Judge Lawson Campbell) to seven years' imprisonment.

The appellant was charged with three other men on an indictment, count one of which charged them with " Possessing explosives, contrary to section 4 (1) of the Explosive Substances Act, 1883," and the Particulars of the Offence stated that on February 17, 1959, they " had in their possession a certain explosive substance . . . under such circumstances as to give rise to a reasonable suspicion that it was not in their possession for a lawful object." The ground of the appeal was, in effect, that as the word " knowingly " had been omitted from the particulars of the offence, the appellant was indicted, tried,

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convicted and sentenced for a non-existent offence, namely, the possession of explosives, and that the conviction was a miscarriage of justice. On November 9, 1959, appeals by two of the other men, Bernard Stewart and Thomas Edward Harris, who had denied knowledge, were allowed (see (1960) 44 Cr. App.R. 29), and on April 27 the court (Lord Parker C.J., Ashworth and Salmon JJ.) adjourned the appeal by McVitie, who in a statement to the police had admitted that he had knowledge, to a full court. On that occasion the court intimated that, unhampered by authority, it felt that it would be a case for the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907, which provides that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

C. G. L. Du Cann (*Miss Beryl Cooper* with him) for the appellant. The indictment on the face of it was incurably and fatally bad. Distinction has been drawn in this court between a fatal flaw and a trifling error or defect in an indictment. In the present case, even if the whole indictment and not only the Particulars of Offence had been read to the jury, they would never have heard the word "knowingly" and the omission of that word was fatal. The trial throughout had been conducted without any reference to knowledge, and the summing-up directed the jury as though knowledge were not a necessary ingredient of the offence. The jury could not be expected to know the provisions of the statute and must have come to their decision on the basis that knowledge was not a necessary ingredient. The fact that the appellant made a statement to the police admitting knowledge is irrelevant. Every prisoner is entitled to a valid trial, and the trial in the present case was a nullity. In such circumstances the court has refrained from applying the proviso to section 4 (1) of the Criminal Appeal Act, 1907. A case on all fours with the present case is Hyde (1934) 24 Cr.App.R. 149, where it was

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said that, where the indictment disclosed no offence, the proviso would not be applied. "Justice" in section 4 (1) means justice according to law and includes the proper functioning of legal machinery. In cases where the proviso has been applied, legal machinery functioned, but did not function properly, whereas in the present case it did not function at all, because there was no valid trial. If there has been no valid trial, the proviso should not be applied merely because the court is satisfied that the appellant was in fact guilty. [He referred also to WILCOCK (1922) 16 Cr.App.R. 102; SCHWELLER (1924) 18 Cr.App.R. 52; TAYLOR (1924) 18 Cr.App.R. 105; and HUGHES (1927) 20 Cr.App.R. 1.]

F. H. Lawton, Q.C. (*J. G. Leach* with him) for the Crown. If examined against the background of the Indictments Act, 1915, and the Indictments Rules, it appears that the indictment in the present case on its face charged an offence known to the law and its defect was that it did not contain sufficient particulars. A defect of that kind could have been caused by amendment under section 5 of the Act of 1915. The appellant had never contested the two essential ingredients of the offence —that he knew that the substance was in his possession and that he knew that it was explosive. His defence was that of lawful excuse for possession. All the essential ingredients of the offence were, therefore, before the jury. This was, therefore, clearly a case where no substantial miscarriage of justice occurred. The proviso to section 4 (1) of the Act of 1907 does not in itself create any limitation with regard to the type of case to which it is to apply. The general principle with regard to the application of the proviso was laid down long ago in COHEN AND BATEMAN (1909) 2 Cr.App.R. 197—whether a jury, properly directed and with all the essential matters before it, could possibly have come to any other conclusion. There is no decision of this court placing any binding restriction on its interpretation. There is no fetter on its discretion other than that it must do justice. In many cases, where an indictment has been wrong, material facts may not have been before the court which tried the case, and in a case where an indictment is wholly bad, the court has no jurisdiction to try the case at all. In THOMPSON (1913) 9 Cr.App.R. 252; [1914] 2 K.B. 99, a case closely analogous to the present one, the court applied the proviso where the indictment had been defective. In MILLETT AND HANOMAN, LTD. (*The Times*, November 11, 1958), the court approved the conviction where the charge itself was bad in law, and that was a stronger case than the present case, where the charge was good, but the particulars bad. On the facts of the case, there could have been no embarrassment or prejudice to the appellant by reason of the defect in the indictment, the evidence against the appellant was overwhelming, and it is submitted that it is a proper case for the application of the proviso.

C. G. L. Du Cann, in reply. The circumstances in COHEN AND BATEMAN (*supra*) were very different from those of the present case. It is conceded that there can be held to have been no substantial miscarriage of justice where, as in that case, on properly admissible evidence and a correct summing-up, a reasonable jury must have come to a conclusion adverse to the defendant; but in this case the trial from first to last was a nullity and invalid. The jury were misinformed with regards to the ingredients of the offence at the beginning, throughout the trial and in the summing-up. Steps in procedure are essential for the protection of the defendant, and if he is denied this right, there has been a miscarriage of justice: CRANE *v.* D.P.P., *per* Lord Sumner (1921) 15 Cr.App.R. 183, at p. 216; [1921] 2 A.C. 299, at p. 331. Here the miscarriage of justice was substantial in that it went to the root of the whole matter, and it would, therefore, not be right to apply the proviso.

At the conclusion of the arguments the Lord Chief Justice said that the court were of opinion that the appeal failed and must be dismissed and that they would give their reasons in writing at a later date.

Cur. adv. vult.

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May 23. The judgment of the court was read by:

DONOVAN J.: The full court dismissed this appeal against conviction on May 9. We now give our reasons for that decision.

McVitie, together with three other men, namely, Martin Harris, Thomas Harris and Bernard Stewart, was convicted at Cambridgeshire Quarter Sessions on April 3, 1959, of the offence of possessing explosives, contrary to section 4 (1) of the Explosives Substances Act, 1883. All four men were sentenced to seven years' imprisonment.

The said section 4 (1) provides as follows: " (1) Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be guilty of felony, and, on conviction, shall be liable to imprisonment for a term not exceeding fourteen years, and the explosive substance shall be forfeited."

McVitie did not seek to appeal against his conviction within the time limit; but he did apply for leave to appeal against his sentence, and on October 20, 1959, this was refused. At the same time the other three prisoners applied for leave to appeal against conviction and sentence. Leave to appeal against conviction only was granted to Thomas Harris and to Stewart. Martin Harris was refused leave to appeal both as regards conviction and sentence.

The appeals of Thomas Harris and Stewart were heard on November 9, 1959, with the result that their convictions were quashed. To understand why, it is necessary briefly to summarise the events which led to the prosecution. All four men were stopped by the police after the motor-car in which they were driving had been chased for some distance by a police car. On a shelf in the back of the men's car was a paper bag which was found to contain gelignite and detonators. Other circumstances, which need not be detailed, raised a reasonable suspicion that these explosives were not intended for any lawful object; and accordingly all four men were prosecuted under the above section 4 (1). The defence of Thomas Harris and Stewart from the outset was that they did not know that any explosives were in the car, and in this they were supported by the evidence of Martin Harris and McVitie. On this point the learned Chairman in summing up the case to the jury said: "So you have to be satisfied not only that the explosives were in the motor-car, but that each one of the men knew they were there, and if you are satisfied on that then that is the first hurdle surmounted by the prosecution."

This direction was given, however, not in relation to the essential ingredient of knowledge, but of possession. It was not explained to the jury that the prosecution must establish, not only that the contents of the paper bag were in the possession of each of the accused men, but that each one knew that the contents were explosives. (See, hereon, HALLAM (1957) 41 Cr.App.R. 111; [1957] 1 Q.B. 569.) This omission was of particular importance in the case of Thomas Harris and Stewart whose defence was that they did not know that explosives were in the car. It was also of importance for another reason, namely, that while the "Statement of Offence" in the indictment was "Possessing explosives contrary to section 4 (1) of the Explosive Substances Act, 1883," the Particulars of the Offence omitted the word "knowingly." This omission may have been in part the reason why the learned Chairman in summing up did not emphasise in the case of Thomas Harris and Stewart that it must be shown that they knowingly had explosives in their possession. In the case of the other two prisoners, Martin Harris and McVitie, this hardly mattered, because both made statements admitting they knew they were carrying explosives. But in all the circumstances the court felt that it would not be right to sustain the convictions of Thomas Harris and Stewart and they were accordingly quashed.

Thereupon McVitie sought leave to appeal against his conviction, and the necessary extension of time for making the application. Leave so to appeal was granted to him on

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March 26, 1960. The ground of his appeal was that, due to the omission of the word " knowingly " from the particulars of the offence given on the indictment, he had been tried and convicted in respect of an offence unknown to the law.

When the appeal was first argued on April 27 the court, consisting of the Lord Chief Justice, Ashworth and Salmon JJ., being satisfied that this was not a case for a *venire de novo*, indicated that they felt the appeal called for the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907 (hereinafter called " the proviso "), but that in view of certain existing authorities which appeared to preclude such a course, the case would be re-listed for hearing by the full court of five judges. The case was accordingly re-argued before us on May 9. On behalf of the appellant, Mr. Du Cann pointed out that on the arraignment of the accused, the words of the indictment which constituted the " Statement of Offence " were not read to the accused. The words, as we have said, were " Possessing explosives contrary to section 4 (1) of the Explosive Substances Act, 1883." The " Particulars of the Offence " were alone read and these, so far as material, were: " You had in your possession a certain explosive substance . . . to wit a four ounce slab of plaster gelatine and four electric detonators under such circumstances as to give rise to a reasonable suspicion that it was not in your possession for a lawful object." This, therefore, was all that the accused and the jury heard as a statement of the offence. All four prisoners pleaded Not Guilty and the trial proceeded. Mr. Du Cann now says that, due to the omission of the word " knowingly," the appellant was arraigned, tried and convicted for a non-existing offence, and accordingly this conviction also should be quashed. Mr. Lawton, for the prosecution, while conceding that the omission of the word " knowingly " from the particulars made the indictment defective or imperfect, argues that this is a clear case for the application of the proviso.

It is conceded by the appellant that he was in no way embarrassed by the omission in question. He admitted that he knew he had explosives in his possession, and he certainly did

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not prove, even on a balance of probabilities, that he had them for any lawful purpose. But he says he was tried on an indictment which was not merely defective but bad, since it disclosed no offence, and this must be a substantial miscarriage of justice precluding the application of the proviso.

Section 3 of the Indictments Act, 1915, provides as follows: "(1) Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge." Rule 4 (3) of the Rules contained in the First Schedule to the Act provides that "The statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence"; and Rule 4 (4) of the same Rules provides "After the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary."

The indictment in the present case conformed to these provisions, save only in one respect. If the words in section 3, "necessary for giving reasonable information," import an objective test (which we think they do) then the word "knowingly" should have been included in the particulars. In our opinion, this did not make the indictment a bad indictment, but simply a defective or imperfect one. A bad indictment would be one disclosing no offence known to the law, for example, where it was laid under a statute which had been repealed and not re-enacted. In the present case the indictment described the offence with complete accuracy in the "Statement of Offence." Only the particulars, which merely elaborate the "Statement of Offence," were incomplete. The question of applying the proviso is to be considered, therefore, not upon the basis that the indictment disclosed no known offence, but that it described a known offence with incomplete particulars. In THOMPSON (1913) 9 Cr.App.R. 252; [1914] 2 K.B. 99, an objection to the indictment on the ground of duplicity was overruled at the trial and the accused was convicted. On appeal this court held that the indictment was in fact bad as alleged, but nevertheless applied the proviso and dismissed the appeal. In doing so the court said this ((1913) 9 Cr.App.R. at p. 266; [1914] 2 K.B. at p. 105): "One of the objects of section 4 was to prevent the quashing of a conviction upon a mere technicality which had caused no embarrassment or prejudice. Whilst giving the right of appeal upon any wrong decision of any question of law, the object of the legislature was that justice should be done in spite of a wrong decision, and that the court should not interfere if it came to the conclusion that, notwithstanding the wrong decision, there had been no substantial miscarriage of justice. The court must always proceed with caution when it is of opinion that a wrong view of the law has been taken by the judge presiding at the trial, but when it is apparent, and, indeed, undisputed, as it is and must be in this case, that no embarrassment or prejudice had in fact been suffered in consequence of the pleader having made the manifest error above mentioned, the court must act upon the proviso in this section of the Act."

In the present case also no embarrassment or prejudice was caused to the accused by the defect in the indictment, but counsel relies upon a later decision of this court in HYDE (1934) 24 Cr.App.R. 149. Hyde was convicted on an indictment in the following terms: "Statement of Offence: Arson, contrary to section 7 of the Malicious Damage Act, 1861. Particulars of Offence: Cecil Hyde, on 7th January 1930, unlawfully and maliciously set fire to certain straw then being in a building, namely, 32 Union Street, Dowlais." It will thus be seen that the offence was not fully described in the particulars, because the following words which appear in the said section 7 were omitted, namely, "under such circumstances that if the building were thereby set fire to the offence would amount to felony." During the argument Avory J. asked counsel for the Crown (at p. 151): "Is there any case where the proviso has been applied where the indictment is so defective that it discloses no offence?" The answer was: "There appears to be no such case." Giving judgment, Lord Hewart L.C.J., said (at p. 151) *inter alia*: "This count does not disclose any offence at all." And further, "In our opinion, the point taken by Mr. Bankes is a good point and there is no escape from the conclusion that the conviction cannot stand. It may well be that if the indictment had been in the proper form and that if the summing-up had directed the jury to those crucial words —which it omitted to do—the verdict would have been the same. This, however, is not a case where the court can apply the proviso." This decision clearly proceeded to some extent upon the view that the indictment disclosed no offence. And this view, in turn, was founded upon the insufficiency of the particulars. But nevertheless the indictment alleged the offence of "arson, contrary to section 7 of the Malicious Damage Act, 1861"; and the particulars themselves, though inadequate, used the expression "unlawfully and maliciously." This court, therefore, cannot share the opinion expressed in the case that the indictment disclosed no offence; and accordingly cannot treat HYDE's case (*supra*) as one which ought to be followed in the present case.

In FRANKS (1950) 34 Cr.App.R. 222; [1950] W.N. 78, the indictment charged the accused with being concerned in dealing in goods the import of which was prohibited or restricted, contrary to section 186 of the Customs Laws Consolidation Act, 1876, but did not contain, as it should have done, an allegation of intent to defraud or to evade the prohibition or restriction. The court therefore quashed the conviction on the ground that the indictment did not disclose the offence. The question of applying the proviso did not, apparently, arise.

In a more recent case a different decision was reached, though it must be said that the two cases last mentioned were not apparently cited to the court. In MILLETT AND HANOMAN, LTD. (*The Times*, November 11, 1958) the statement of offence was defective in that it alleged that the accused were "Being

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knowingly concerned in attempting to evade a prohibition on the export of goods, contrary to section 56 (2) of the Customs and Excise Act, 1938," instead of "Being knowingly concerned in the exportation . . . of goods with intent to evade" the prohibition imposed by the Act. The offence was, however, accurately described in the particulars. At the trial an objection was taken to the statement of offence as it was worded, but the objection was overruled. On appeal it was contended that the indictment disclosed no offence, and that the conviction should therefore be quashed. But seeing that the particulars accurately described the offence, it was clear that the accused were not prejudiced or embarrassed at all, and this court, holding that no substantial miscarriage of justice had occurred, applied the proviso. Other cases were cited to us, but it is unnecessary to do more than mention them. They included: COHEN & BATEMAN (1909) 2 Cr.App.R., 197; WILCOCK (1922) 16 Cr.App.R. 102; SCHWELLER (1924) 18 Cr.App.R. 52; TAYLOR (1924) 18 Cr.App.R. 105; and HUGHES (1927) 20 Cr.App.R. 4.

In the present case it is clear that no embarrassment or prejudice was caused to the accused by the omission of the word "knowingly" from the particulars, or from the arraignment. He had been properly charged in the first place, and properly committed for trial and the Attorney-General's fiat was in proper form. If the word "knowingly" had been in the particulars and the Chairman had said to the jury: "You must be satisfied that McVitie knew that there were explosive substances in the paper bag in the car," he would inevitably have gone on to say—as indeed he did—"but McVitie admits he had this knowledge." This essential ingredient of the offence was therefore established, despite the omission of the word in question. The present case is, therefore, a clear case where no substantial miscarriage of justice has occurred, and the court accordingly applied the proviso and dismissed the appeal.

In the course of the argument the question was raised, but not fully explored, whether once the court reaches the conclusion that there has been no substantial miscarriage of justice,

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there is any fetter upon the way the court may decide to exercise its discretion as regards applying the proviso. Section 4 itself leaves the court free in the matter, and there is no restriction unless previous decisions of the court in comparable cases are to be regarded as binding precedents. It is unnecessary to pursue this point in the present case, for we are satisfied, whatever be the right view upon this point, that no previous decision, properly appreciated, precludes the application of the proviso here.

Since leave to appeal was eventually obtained by the appellant, his sentence will run from the date of conviction.

Appeal dismissed.

Solicitors: W. B. Blackwell & Co., for the appellant.

CIRCUIT CASE
[NORTH EASTERN CIRCUIT]

BEFORE

MR. JUSTICE EDMUND DAVIES

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Manslaughter—Death Resulting from Unlawful Act—Criminal Abortion—Verdict of Acquittal not Possible—Involuntary Manslaughter—Accessory before the Fact.

Though the mere fact that death resulted from an unlawful act no longer necessitates a verdict of manslaughter, there cannot be an acquittal, where death flows from a criminal abortion or other intentional unlawful act which involves a considerable risk to the person, and there must, at least, be a conviction of manslaughter.

A person can be accessory before the fact to involuntary manslaughter, and one who procures another person to commit

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a criminal abortion is guilty of being an accessory before the fact to manslaughter, if death results from that abortion.

Andrews *v.* D. P. P., 26 Cr.App.R. 34; [1937] A.C. 576, distinguished and explained.

Dictum of Bramwell B. in Gaylor (1857) Dears. & B. 288, at p. 291, followed.

Trial at Leeds Assizes before Edmund Davies J. and a jury.

The prisoners, Olive Buck and Leonard Buck, were indicted, in the case of the female prisoner for the manslaughter of Eileen Gillson and in the case of the male prisoner for being accessory before the fact to manslaughter. The case for the Crown was that the woman had died as a result of a criminal abortion performed on her by the female prisoner, and that the male prisoner had counselled and procured the abortion. At the close of the case for the prosecution it was submitted by defending counsel that there was no case to go to the jury.

D. C. Chapman (*D. Wagstaff* with him), for the prisoners. The first submission is that it is no longer the law that death resulting from an unlawful act, even though the unlawful act be a felony, is necessarily manslaughter. This submission applies to both prisoners. The second submission is that there cannot be an accessory before the fact to involuntary manslaughter. This submission applies to the male prisoner only. The law that death resulting from an unlawful act must amount to manslaughter was finally altered by the decision in Andrews *v.* D. P. P., 26 Cr.App.R. 34; [1937] A.C. 576. Long before that, the doctrine had been watered down in Franklin (1883) 15 Cox 163, although it does not appear clearly from the report whether direct consideration was given to the question whether the prisoner's act in taking and throwing the box into the sea, which was certainly tortious, also amounted to the felony of larceny. [He referred to *Russell on Crime*, 11th ed., Vol. I, pp. 622 *et seq.*] Lumley (1912) 76 J.P. 208 must be taken to have been overruled by Andrews *v.* D. P. P. (*supra*) which shifted the whole emphasis from the unlawfulness of the act to the idea of criminal negligence.

On the second point, the authority relied on by the Crown is GAYLOR (1857) Dears. & B. 288, but the observations of Bramwell B. in that case do not cover the facts of the present case, unless they can be extended by saying that a woman cannot consent to an abortion or that the facts of the two cases are really indistinguishable. Moreover, GAYLOR (*supra*) is inconsistent with two other cases, SMITH AND TAYLOR (1847) 2 Cox 223 and FRETWELL (1862) 9 Cox 152.

A. Goss, for the Crown (who was called on on the first point only).

The Crown take their stand on the decision in LUMLEY (*supra*), which has been followed by every judge up to the present day. In ANDREWS *v*. D. P. P. (*supra*) not only death resulting from felonious interference by one person with another was being considered, but also the duty to take care. The decision was confined to the facts and to liability for motor manslaughter only.

EDMUND DAVIES J.: Olive Buck and Leonard Buck stand indicted, in the case of the female defendant for unlawfully killing Eileen Gillson by an act of criminal abortion, while Leonard Buck is charged with being accessory before the fact to that manslaughter.

At the conclusion of the case for the prosecution Mr. Chapman, who appears for the defence, made two submissions which, out of respect for his argument, I do not think I ought to deal with simply by saying that I reject both of them. I propose to indicate the reasons for arriving at my decision to reject each of them.

The first submission relates to both defendants. Mr. Chapman said that it is no longer the law, as it appears at one time to have been, that death resulting from an unlawful act is of necessity manslaughter. He accordingly submitted that, even though it be established that Mrs. Gillson died as a result of a criminal abortion performed on her by the female defendant, that does not establish manslaughter. In the same way he submitted that the male defendant is not, by reason of the fact that he may have procured a criminal abortion and that death resulted therefrom, guilty of being accessory before the fact to manslaughter. The second submission relates only to the male defendant and is to the effect that there cannot in law be an accessory before the fact to involuntary manslaughter of the kind which the Crown alleges occurred in this case.

The first submission largely turned on the decision of the House of Lords in ANDREWS *v.* D. P. P., 26 Cr.App.R. 34; [1937] A.C. 576. That was a case decided on very special facts and arose out of the death of a man caused by what was alleged to be the dangerous driving of a motor-car. In the course of his summing up, the learned trial judge said: "If a man is doing an unlawful act—if he is doing something which the law says that he must not do—and, because he is doing it and in the course of doing it he kills somebody, then he is guilty not only of that unlawful act, but of manslaughter. He has killed somebody in the course of doing, and because he was doing, an unlawful thing. . . . If he is driving [a motor-vehicle] recklessly, he commits an offence whether he kills anybody or whether he does not, but if because he is driving recklessly somebody is killed, then he is guilty of the offence of manslaughter, . . . I think I ought to tell you this, that if you thought that although he drove recklessly, and although he drove at a speed or in a manner dangerous to the public within the words of [s. 11 of the Road Traffic Act, 1930], but that it was not because of that that this man was killed, the law would entitle you to convict him not of manslaughter but of dangerous driving. But in this case I am bound to tell you that if you think that he was driving recklessly and in a dangerous manner within the meaning of those words, and that it was because of that that Mr. Craven was killed, then it is your bounden duty to convict him of manslaughter." In that case, which I stress was a case arising out of death resulting from the driving of a motor-car, the House of Lords, according to the headnote in the *Law Reports*, held that: "Where a person is indicted for manslaughter for having, while driving a motor-car, unlawfully killed a man, the judge, in directing the jury, should in the first instance tell them that the facts must be such that in their opinion the negligence of the accused went beyond a mere matter of compensation between subjects and showed such a disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment; he should then explain that such degree of negligence is not necessarily the same as that which is required for the offence of dangerous driving; and further he should indicate the conditions under which they may acquit the accused of manslaughter and convict him of dangerous driving. A direction that all the jury have to consider is whether death was caused by dangerous driving within section 11 of the Road Traffic Act, 1930, and no more, is a misdirection." Counsel for the defence in the present case quoted from the speech of Lord Atkin (26 Cr.App.R. at p. 45; [1937] A.C. at p. 581), in the course of which the learned Lord said: " My Lords, of all crimes manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions. From the early days, when any homicide involved penalty, the law has gradually evolved ' through successive differentiations and integrations ' until it recognises murder on the one hand, based mainly, though not exclusively, on an intention to kill, and manslaughter on the other hand, based mainly, though not exclusively, on the absence of intention to kill but with the presence of an element of ' unlawfulness ' which is the elusive factor. In the present case it is only necessary to consider manslaughter from the point of view of an unintentional killing caused by negligence, that is, the omission of a duty to take care." I stress those last words, for it appears to me that they afford the keynote and provide the necessary limitations to be observed in the attempt which is sometimes made, and has been sought to be made here, to apply the decision in ANDREWS (*supra*) to cases wholly different from that which the House of Lords had to consider.

I read ANDREWS (*supra*) as a case which turned on its facts, the pre-eminent fact being that death had arisen from an act of negligence. Mr. Chapman says that ANDREWS (*supra*) decides that the mere fact that death resulted from an unlawful act no longer necessitates a verdict of manslaughter. I think that the answer to that is that one has to have regard to what is the nature of the unlawful act charged. In this case the unlawful act, which for the purpose of the present submission one assumes is proved against the female defendant, is criminal abortion. Can it be said that, if criminal abortion is shown to have been committed and, furthermore, death is shown to have resulted therefrom, the abortionist is not guilty, at the very least, of manslaughter? If a negative answer is demanded since Andrews (*supra*) to that question, one is radically departing from the law as it has been established in this country for many years and frequently applied to cases such as the present. I refer in particular to the well-known decision of Avory J. in Lumley (1912) 76 J.P. 208. The facts were that a physician who had been struck off the medical register was indicted for the murder of a woman on whom he had performed an illegal operation, in consequence of which she died. In his summing up to the jury, which has been frequently regarded as authoritative on this branch of the law and which has since been repeatedly cited, that great judge said: " If the evidence satisfies you beyond reasonable doubt that the prisoner did, in fact, use either an instrument or other means for the purpose and with the intention of procuring abortion, and death resulted from that act, then you must ask yourselves the further question: when he did that, did he contemplate or must he as a reasonable man have contemplated that death is likely to result, or must he as a reasonable man have contemplated that grievous bodily harm was likely to result? If, in your opinion, he must as a reasonable man have contemplated either of those consequences, then your duty is to find him guilty of murder. If you are of the opinion, and are driven to the conclusion by the evidence, that he did the act which is charged against him, but that he had not at any time any contemplation, and would not as a reasonable man have contemplated, that either death or grievous bodily harm would result, but thought that by his own skill as a medical man he could perform this operation without any risk of either death or grievous bodily harm, then you would be justified in convicting him of manslaughter." There is not a hint in that summing up and direction to the jury that there could conceivably be an acquittal; but if ANDREWS (*supra*) has, indeed, altered the law applicable to such cases as the present one, then LUMLEY (*supra*) would no longer be an authority to be followed.

Mr. Chapman referred further to FRANKLIN (1883) 15 Cox 163. The headnote, for the present purposes, sufficiently conveys what was there decided. It reads: "The mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is a necessary step in a criminal case, apart from the question of criminal negligence. Therefore, the mere fact of a person wrongfully taking up a box from a refreshment stall on a sea pier and wantonly throwing it into the sea, and thereby unintentionally causing the death of another bathing in the sea, is not *per se* and apart from the question of negligence sufficient to constitute the offence of manslaughter." That, of course, was a case decided on facts wholly different from those of the present case and although, as Mr. Chapman pointed out, it may be that there was material there on which not merely a civil wrong, but larceny of the box, could have been relied upon, it is noteworthy that the case treats the abstraction of the box merely as a civil wrong.

The offence of manslaughter is unlawful killing without malice aforethought. *Russell on Crime*, 11th ed., Vol. I, p. 622, says that it is a killing which the killer neither intended nor foresaw as likely to happen. It is an accidental, albeit blameworthy and felonious, killing. In my judgment, where death flows directly from a felony of the kind here charged the offence must, at the very least, be manslaughter. In circumstances of a kind which nobody for one moment suggests existed in the present case, it might even be murder. It is an offence which involves a considerable risk to the person, no matter with what

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care it may be committed. The medical evidence in the present case is that the particular woman died of shock. Shock, the doctor said, is one of the rare reasons why deaths from abortions do occur, but that there is always a risk in a criminal abortion of death resulting from shock is, to my way of thinking, undeniable. It cannot, in my view, be right to say, where death is proved to have resulted from criminal abortion, that nevertheless the abortionist may be guilty of no offence of a homicidal character at all. Accordingly, the first submission so cogently put forward by Mr. Chapman is not made out.

The second submission, I recall, was that there cannot be any accessory before the fact to involuntary manslaughter and that, despite the fact that I have overruled the first submission, the male defendant therefore ought not to be convicted of being accessory before the fact to manslaughter by criminal abortion. Mr. Chapman submitted that procuring a manslaughter is impossible in law. Procuring an abortion there may be, but even though death results from that criminal abortion, nevertheless there cannot be procuring of manslaughter. The authorities on the matter are not many. Reference has been made to a passage in Archbold's *Criminal Pleading*, etc., 34th ed., § 4147. There is a passage in Dr. Glanville Williams' *Criminal Law* at paragraph 60 which reads: " Formerly it was held that in manslaughter there could be no accessories before the fact; but that view is now much qualified. It does not apply to involuntary manslaughter, and perhaps even in voluntary manslaughter the courts may now recognise it as possible that the principal acts under the joint influences of provocation and instigation " and GAYLOR (1857) Dears. & B. 288 to which I must shortly refer, is there cited. In *Russell on Crime*, 11th ed., Vol. I, at pp. 168–169, the matter is put in this way. Having pointed out that there was an idea that there could not be an accessory before the fact to manslaughter, the learned editor continues: " In modern times, however, such a doctrine has become obsolete for involuntary manslaughter. Although there is no clear and positive definition of manslaughter enunciated by the courts, it is clear (a) that the principal in the first degree to involuntary manslaughter must have no realisation that his conduct may prove fatal and (b) that he must have voluntarily embarked on the line of conduct that did cause this unforeseen death. Accordingly, anyone who procured or advised, etc., the conduct in question can be held guilty as an accessory before the fact." In GAYLOR (*supra*) the prisoner was convicted of manslaughter and I quote from the short headnote: "It appeared that the prisoner procured sulphate of potash and gave it to his wife intending her to take it for the purpose of procuring abortion; and that she, believing herself to be pregnant, although in reality she was not, took the sulphate of potash in the absence of the prisoner, and died from its effects." It was held that the conviction of the husband for manslaughter was right. Mr. Chapman has criticised this report and particularly the intervention of Erle J. at page 293 as affording, perhaps, unreliable guidance to the courts in those days; but I note that that great judge Bramwell B. at page 291 said this: "Suppose a man, for mischief, gives another a strong dose of medicine, not intending any further injury than causing him to be sick and uncomfortable, and death ensues, would not that be manslaughter? Suppose, then, another had counselled him to do it, would not he who counselled be an accessory before the fact?" Obviously, the learned Baron took the answers to both those questions to be clearly in the affirmative.

It was finally said by Mr. Chapman that there were two authorities which conflicted with GAYLOR (*supra*) and that, accordingly, I ought not to follow GAYLOR (*supra*) today. The first was SMITH AND TAYLOR (1847) 2 Cox 223, the headnote to which reads: "Upon an indictment against two for manslaughter by administering poison, charging both as principals, it appeared that the prisoners had agreed to administer the poison, not for the purpose of killing, but to make the deceased remain at home, and in order to reform his habits; and that one of the prisoners was not present when the poison was administered. *Quaere*, whether one should not have been indicted as accessory before the fact? *Semble*, *per* Parke B. that she ought; *per* Patteson J. that she ought not." I do not regard a case in which Parke B. thought there could be an accessory before the fact to manslaughter, while Patteson J. thought there could not, as an authority which ought to persuade me that GAYLOR (*supra*) is an unreliable authority to follow.

Finally, FRETWELL (1862) 9 Cox 152 was cited by Mr. Chapman. It is in some ways an unsatisfactory report. The headnote says: "The deceased woman became pregnant by the prisoner, and died from the effects of corrosive sublimate taken by her for the purpose of procuring abortion. The prisoner knowingly procured it for the deceased, at her instigation and under the influence of threats of self-destruction if the means of procuring abortion were not supplied to her. The jury negatived the fact of the prisoner having administered it, or caused it to be taken by her. *Held*, that the prisoner was not guilty of murder as an accessory before the fact."

The charge was one of murder. The learned trial judge Cockburn C.J. put questions specially to the jury upon which, as appears from the foot of page 152, they expressly negatived the allegation that the prisoner administered the poison or caused it to be taken. He held that the prisoner was not guilty of murder as an accessory before the fact. The report proceeds: "Case reserved for the opinion of this court by Cockburn C.J. Francis Fretwell was indicted and tried before me, at the last assizes for the county of Nottingham, for the wilful murder of Elizabeth Bradley. The deceased had died from the effects of corrosive sublimate taken for the purpose of procuring abortion. The poison had been procured for her by the prisoner with full knowledge of the purpose to which it was to be applied; but there was ground for believing that the prisoner in procuring the poison had acted at the instigation of the deceased, and under the influence of threats by her of self-destruction if the means of procuring abortion were not supplied to her. She was a married woman living in service separately from her husband, and had become pregnant by the prisoner. She had endeavoured to purchase corrosive sublimate herself, but the druggists to whom she had applied having refused to furnish it to her, she had urged the prisoner to procure it. The prisoner was not present when the poison was taken. The facts in question occurred in the month of July 1861, anterior to the coming into operation of 24 & 25 Vict. c. 94. The jury, upon questions specially put to them by me upon the evidence, expressly negatived the fact of the prisoner having administered poison to the deceased, or caused it to be taken by her. They found specially that the prisoner procured the poison, and delivered it to the deceased with a knowledge of the purpose to which she intended to apply it, and that he was therefore accessory before the fact to her taking poison for the purpose of procuring abortion." The report ends by saying that the conviction (which I stress was a conviction of murder) was reversed. It says no more than that. In the course of his judgment Erle C.J. related what had happened in the court below and the questions specially put to the jury, but it is to be noted that at the end of page 154 the Chief Justice dealt first of all with RUSSELL (1832) 1 Moo.C.C. 356 and then went on in this way: " Now, in the present case there appears to me to be a very marked distinction between the conduct of the prisoner Fretwell and the conduct of the prisoner Russell. In RUSSELL's case (*supra*) the prisoner administered the poison. In the present case the prisoner was unwilling that the deceased should take the poison; it was at her instigation and under the threat of self-destruction that he procured it and supplied it to her; but it was found that he did not administer it to her or cause her to take it. It would be consistent with the facts of the case that he hoped she would change her mind; and it might well be that the prisoner hoped and expected she would not resort to it." It may be that that interpretation of the finding of the jury was very benevolent to the accused—I know not.

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There is no doubt, in my mind, that the reversing of the conviction of murder is one which proceeded on the view adopted by Erle C.J. that " it would be consistent with the facts of the case that [the husband] hoped [his wife] would change her mind. It might well be that the prisoner hoped she would not resort to it." In my judgment, the decision in FRETWELL (*supra*), like that in SMITH (*supra*), affords no grounds for thinking that the view clearly expressed by Bramwell B. in GAYLOR (*supra*) is a view which ought not to be applied to the present circumstances.

For the reasons I have endeavoured to state, in my judgment, both submissions are ill-founded. I hold that, where criminal abortion is proved to have taken place and death is proved to have resulted from that criminal abortion there must, at least, be a conviction of manslaughter. In my judgment, further, there can be an accessory before the fact to involuntary manslaughter or, to bring the matter more directly to bear on the present case, a man or woman who procures another person to commit a criminal abortion is guilty of being an accessory before the fact to manslaughter if death results from that abortion.

Solicitors: for the defendants, Wright & Wright, Keighley.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY
AND MR. JUSTICE HAVERS

JOSEPH CARTER

1960
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Trial—Unfair Conduct—Unrepresented Prisoner—Prisoner not Asked if he Wished to Call Witnesses—Summing-up—Comments on Lack of Support of Prisoner's Evidence — Conviction Quashed.

It is essential that an unrepresented prisoner should be asked by the judge whether he wishes to call any witness in his defence.

Conviction quashed in a case where an unrepresented prisoner had not been asked by the judge whether he wished to call any witness in his defence, although he had intimated that there was a witness in court who might assist his case, and where the judge, in his summing-up, had commented unfavourably on the lack of documentary evidence supporting the prisoner's case.

Appeal against conviction.

The appellant was convicted at Surrey Quarter Sessions on February 12, 1960, on two charges of receiving stolen property and was sentenced by the Deputy-Chairman (His Honour Judge Reid) to concurrent terms of twelve months' imprisonment.

At the trial the appellant applied for an adjournment on the ground that he had been told of the hearing only at 8.10 a.m. on that day and that he understood that he was being brought to court merely for the purpose of renewing his bail. He said that he desired to instruct solicitor and counsel and that he was not then in a position to present his case. The Deputy-Chairman refused the application for an adjournment, and the appellant was unrepresented at his trial. He gave evidence on his own behalf and intimated that his

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brother-in-law was in court and might be able to assist his case. After he had given evidence, the appellant was told: " You had better go back to your place " and was not asked whether he wished to call his brother-in-law or any other witness. In his summing-up the Deputy-Chairman commented unfavourably on the lack of documentary evidence supporting the appellant's case. The material portions of the summing-up appear in the judgment.

James Burge for the appellant. Since 1836 all prisoners charged with felony have had the right of being represented by counsel. If through some misunderstanding an accused person finds himself, contrary to his desire, to be unrepresented and the court thinks it proper to refuse an adjournment, the proper course is for the presiding judge to appoint counsel to represent the prisoner, as was suggested in KINGSTON (1948) 32 Cr.App.R. 183. If this course is not taken, it is imperative on the court to see that the prisoner is not prejudiced by being unrepresented. In the present case objection could have been taken to evidence of finding a bunch of ignition keys in the car when the indictment was for receiving, and to the line of cross-examination which was adopted. The appellant was forced to attempt to present his defence without having a copy of the depositions, without witnesses whom he desired to call being present, and, above all, without his being able to produce a receipt for the purchase of the car which he said was in existence. The prosecution effectively prevented the production of this receipt by objecting to an adjournment, and then cross-examined the appellant on its non-production, and unfortunately the same line was adopted by the Deputy-Chairman when summing up. Inasmuch as the appellant was not asked by the court whether he wished to call any witness, he did not have a fair trial, nor did justice appear to be done, with the inevitable result that there was a substantial miscarriage of justice, which cannot be cured by the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

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Felix Waley for the Crown. The decision whether to grant an adjournment or not was a matter for the discretion of the Deputy-Chairman. It is unfortunate that the appellant was not asked by the Deputy-Chairman if he wished to call any witness, but the evidence against the appellant was overwhelming and it is submitted that the proviso could properly be applied to this case.

THE LORD CHIEF JUSTICE: This appellant was convicted at Surrey Quarter Sessions on two counts of receiving and sentenced to concurrent terms of twelve months' imprisonment. He now appeals by leave of the court against that conviction, the main ground being that his trial was not fairly conducted.

The facts were quite simple. A motor-car was stolen some time about November 12, 1959. On November 24, 1959, the appellant was seen driving the car with false number-plates, and in the back of the car or in the boot there was a quantity of goods. He was charged with receiving the motor-car and receiving the goods. If the evidence of the police was to be believed, he in fact made a complete admission because, when he was questioned, he is alleged to have said: "O.K., I know it is a 'ringer.' You have caught me," and when he was asked about the goods he said: "Just a bit of 'bent' gear. I did not 'nick' it," and in a later passage: "You have caught me fair." However, the case he sought to advance at the trial was that he never did say that to the police, that he had bought the car in good faith from a man called Martin and had obtained a receipt on some paper headed: "Skyport Motors," that he had never realised anything was in the boot until later, and that he intended to give what was in the boot back to Martin.

The court feels that the case against the appellant was almost overwhelming, bearing in mind his admissions to the police in respect of the motor-car, which was said to have been bought in Warren Street in very curious circumstances, and that he never saw a log-book at all. In all the circumstances, one would be very surprised if, on a proper direction, the appellant were not convicted.

However, what happened was this. The offence was committed in November 1959. On December 9 the appellant was committed to the December Sessions. At that time he was suffering from some eye trouble. He was taken to St. Thomas's Hospital, and, as the result of medical certificates produced, he was not fit to stand his trial at either the December or the January Sessions. He was, however, fit to stand his trial at the February Sessions, and we are told that the case was in the list on February 9, but that for some reason it was put over till the 11th, and from the 11th to the 12th. On February 12, which was a Friday, the case came on at midday. The appellant, who was unrepresented, as soon as he had an opportunity to do so, which was when he was asked if he wished to cross-examine the first witness, complained that he had only been told on the 9th, three days before, that the case was due to be heard at those Sessions. He claimed that he had been told it would be heard in about a fortnight's time. He also said he had not been told of that day's hearing till ten minutes past eight in the morning, and he understood that he was being brought to court merely for the purposes of renewing his bail. At any rate, he asked for an adjournment in order that he could instruct counsel and, what is perhaps more important, he said that, owing to being notified at the last moment, he was not in a position to present his case. At the end of the argument before the adjournment he said: "I do not know what to say. I have not got anything with me to prove my case." The matter was further discussed after the midday adjournment, and the appellant ended by saying: "This, Sir, has really taken me aback. I ask the jury in any case to understand me." On that, his application for an adjournment was refused. No doubt the Deputy-Chairman had in mind the number of occasions that the case had been down for hearing at Sessions, and that it had been in the list on February 9 and 11. He also, no doubt, had in mind that the appellant had had solicitor and counsel at the proceedings before the magistrates and that he ought to have had plenty of time to instruct solicitor and counsel if he so desired. It may well be that the Deputy-Chairman felt in all the circumstances that this was a last-minute application and not bona fide. So far as that is concerned, the court feels that there would be no ground for interfering with the discretion of the Deputy-Chairman, albeit steps might have been taken with regard to having counsel assigned to him at the last moment.

The matter, however, does not end there. When the Deputy-Chairman came to sum up, he referred to the appellant's defence in these terms: " Now what the defendant said was this: He was a motor dealer and he went up to Warren Street and he bought the car and, as I understood him, he had only got £50 on him, the value of the car being something like £750. He was going to buy it for £610. He paid £50 down. He was going to pay another £100 and then the rest of the money for the car was going to be paid by instalments under some sort of hire-purchase agreement." Then he goes on: " Of course, there is no documentary evidence in support of this story, and of course, if you accept his story, it depends on his own answer for what he did." The court feels that the Deputy-Chairman there was plainly saying, in effect, to the jury: " Can you really believe this extraordinary story of the purchase of the car, especially as there is not a scrap of documentary evidence to support it? " That occurred in the summing-up in a case where, first of all, the prisoner had complained of being notified at the last moment and of being unable to bring the witnesses and documents to prove his case, and it took place after a cross-examination which took this form: The appellant was asked: " You say you bought the car? (A) A man named Martin signed the receipt, trading as ' Skyport Motors.' (Q) Have you got the receipt? (A) Sir, I. . . ." Then he was interrupted, and the next question is: " It is quite a simple

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question. (A) I explained to this court. I did not come to this court prepared to stand trial. I did not bring the receipt here." There are further passages to the same effect, but finally, almost at the end of the cross-examination he was asked this: "That receipt for the car, indicating from whom you bought it. Are they here today? (A) I was called here today by the police saying I was required to renew my bail. My brother-in-law is in the court and he will verify that." The court feels that that passage in the summing-up is at least unfortunate when the appellant had throughout complained that he had the receipt, but had not been able to bring it. It is also to be observed from the passage I have just read that he had his brother-in-law there and his brother-in-law apparently was prepared to verify that the appellant had come there thinking that it was only for the purpose of his bail being renewed.

After the appellant had given his evidence, he was told: "Very well, you had better go back to your place." He was not asked whether he wanted to call the brother-in-law or whether he had any witnesses to call at all. He was sent back to his place.

The court feels that although it would be impossible to interfere with the discretion of the Deputy-Chairman in refusing to adjourn the case, for that reason alone it became imperative to ensure that this appellant, who was unrepresented, had every opportunity of putting forward his defence, calling his witnesses, and for that purpose, the court should have given him every assistance. As I have said, he was not asked if he wished to call any witnesses, and despite the cross-examination and his explanations for the absence of the receipt, the Deputy-Chairman stated in plain terms to the jury: "Can you really believe his evidence when there is no documentary support for his story?" The court feels that that statement in the summing-up was in all the circumstances I have related unfortunate. They feel that the appellant, unrepresented as he was, did not

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in the result have a fair trial, and that it would be wrong in this case to apply the proviso. The conviction must be quashed.

Conviction quashed.

Solicitor: Edward Thompson, for the appellant.

BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE McNAIR AND
MR JUSTICE DAVIES

ROY WILLIAM ASTLE

1960
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Sentence—Corrective Training—Consecutive Sentence of Imprisonment not Proper.

A sentence of imprisonment to begin on the expiration of a sentence of corrective training already being served ought not to be passed.

Substitution of a longer sentence of imprisonment, which had the effect of abrogating what remained of the sentence of corrective training, where this course had been adopted.

HEDGECOCK (1957) 41 Cr.App.R. 136 followed.

Appeal against sentence.

The appellant pleaded Guilty at Durham Assizes on February 5, 1960, to arson and conspiracy to commit arson and was sentenced by Salmon J. to eighteen months' imprisonment concurrent on each charge, the sentences to run consecutively to a term of three years' corrective training which the appellant was then serving.

The appellant had been sentenced in April 1958 to the term of corrective training. In October 1959 he conspired with other prisoners in the prison where he was then detained

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to set fire to the workshop. The workshop in fact was set on fire and an immense amount of damage to property was done.

W. R. Steer, for the appellant.

No counsel appeared for the Crown.

Hilbery J.: In the view of this court, as this court has said more than once, a sentence of imprisonment to begin on the expiration of a sentence of corrective training already being served ought not to be passed. That was laid down quite clearly, and perhaps most clearly, in Hedgecock (1957) 41 Cr.App.R. 136. The court is, therefore, of opinion that this sentence must be set aside and there must be substituted for it a sentence of three years' imprisonment on each of the counts on which the appellant was found guilty on his own confession, to run concurrently, and that sentence will, of course, abrogate what remains of the sentence of corrective training. It will run from the date of conviction.

I may add that this is a case where it is clear that it would not be appropriate to pass a sentence which would merely add to the period of corrective training, for the report of the Prison Commissioners is that he is an aggressive, headstrong and intolerant person who has failed to co-operate during training. He was, therefore, not recommended for further corrective training. There will also be an order under section 22 of the Criminal Justice Act, 1948, as amended.

Sentence varied.

BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE McNAIR AND
MR. JUSTICE DAVIES

ARTHUR JAMES CRAVEN

1960
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Sentence—Probation Order—Imprisonment during Probation Period for Another Offence—Appellant Subsequently Brought before Court in Respect of Breach of Probation Order—Sentence of Corrective Training—Imprisonment Substituted by Court of Criminal Appeal.

On July 4, 1958, the appellant was placed on probation for three years for attempting to obtain property by false pretences. On July 16, 1958, the appellant was sentenced at another court to three years' imprisonment for a large number of offences of false pretences and larceny. Later he was brought back to the court which had originally made the probation order in respect of the breach of probation to receive sentence for the original offence. He was then sentenced to three years' corrective training. On appeal against that sentence,

Held, that it was wrong to impose a sentence of corrective training which would in effect set aside the sentence of imprisonment imposed by another court, and that a sentence of twelve months' imprisonment, to run concurrently with the sentence of three years' imprisonment, should be substituted for the sentence of corrective training.

Appeal against sentence.

The appellant, having been convicted at Somerset Quarter Sessions on July 4, 1958, of attempting to obtain property by false pretences and placed on probation for three years, broke the terms of the probation order by committing further offences, and, having been brought back to receive sentence for the original offence, on January 6, 1960, was sentenced by the Deputy-Chairman to three years' corrective training.

On July 4, 1958, the appellant was convicted at Somerset Quarter Sessions of attempting to obtain a racehorse by false pretences and was placed on probation for three years. On July 16, 1959, the appellant appeared before Croydon Borough

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Sessions and was convicted of obtaining money by false pretences and larceny and thirty-two other offences were taken into consideration and he was sentenced to three years' imprisonment. The result of that conviction was that he had broken the terms of his probation order. He was accordingly brought before Somerset Quarter Sessions to be dealt with for the breach. The matter was adjourned because an application was pending before the Court of Criminal Appeal for leave to appeal against the sentence of three years' imprisonment. The application was refused, so that in effect the court affirmed that sentence.

On January 6, 1960, the appellant came before Somerset Quarter Sessions and was sentenced to three years' corrective training. The Deputy-Chairman said that the sentence would be three years' corrective training from that day, concurrent with the term of imprisonment already imposed and would have the effect of starting the corrective training immediately.

McNAIR J. [after stating the facts as set out above]: It seems to this court that Somerset Quarter Sessions were, in effect, imposing a sentence of three years' corrective training to take the place of the sentence of three years' imprisonment which was imposed at Croydon Quarter Sessions and which was affirmed by this court by their refusal of the application for leave to appeal. In the opinion of this court, that cannot be right. It is quite clear that a person cannot at the same time both serve a sentence of corrective training and a sentence of imprisonment. When Croydon Quarter Sessions had determined that three years' imprisonment was the correct sentence for the offences with which they were then dealing and the thirty-two other offences which they took into account, it was clearly quite wrong that another court should impose a sentence of corrective training which would, in effect, set that sentence aside. Accordingly, the sentence of three years' corrective training must be set aside.

The only remaining question is: what is the proper sentence to impose in respect of the breach of the probation order? It seems that on the facts of the original conviction in July 1958, which this court has heard, the appropriate sentence could not conceivably have been a sentence of anything like three years' imprisonment and, accordingly, the court will substitute a concurrent sentence of twelve months' imprisonment for the original offence.

Sentence varied.

BEFORE

MR. JUSTICE HILBERY, MR JUSTICE McNAIR AND
MR. JUSTICE HAVERS

HARRY DAVIS

Jury—Question to Judge after Retirement—Answer by Judge without Prisoner or Counsel being Present—Further Questions by Jury—Consultation between Judge and Clerk of the Peace—Communication by Clerk of the Peace to Jury—Shorthand Writer Present in Jury Room—Fresh and Inaccurate Evidence in Effect Introduced—Conviction Quashed.

It is essential that any communication which passes between the jury, after they have retired to consider their verdict, and the judge should be in open court in the presence of the prisoner and counsel on both sides.

It is further essential that, once the summing-up is concluded and the jury has been enclosed, no further evidence should be adduced.

The introduction of a shorthand writer into the jury room after the jury have retired without any order of the court is a grave irregularity necessitating the quashing of the conviction.

Conviction quashed where communications had passed between the presiding judge and the jury through the medium of the Clerk of the Peace, without either the prisoner or counsel being present, and where the Clerk of the Peace had in effect introduced fresh and inaccurate evidence to the jury and had, on his own initiative, taken a shorthand writer with him into the retiring room of the jury.

GREEN (1950) 34 Cr.App.R. 33; [1949] W.N. 488 followed.

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Appeal against conviction.

The appellant was convicted at East Kent Quarter Sessions on January 5, 1960, on three charges of obtaining property by false pretences and was sentenced by the Deputy-Chairman (Christmas Humphreys, Esq., Q.C.) to two years' imprisonment.

After the jury had retired to consider their verdict, they sent a question to the Deputy-Chairman with regard to certain counterfoils of postal orders which defending counsel had handled in the course of his cross-examination of Crown witnesses. The Deputy-Chairman sent back an answer orally through the medium of the Clerk of the Peace, without having the appellant or counsel brought back into court. The Clerk of the Peace, on his own initiative, took the shorthand writer with him into the jury room. Further communications passed orally between the Deputy-Chairman and the jury, through the agency of the Clerk of the Peace, which are set out in full in the judgment.

Basil Wigoder, for the appellant.

The proceedings between the Deputy-Chairman and the Clerk of the Peace were wholly irregular. All the communications should have taken place in open court, in the presence of the appellant and counsel: GREEN (1950) 34 Cr.App.R. 33; [1949] W.N. 488. The second communication, after the Clerk of the Peace had said that he had made further inquiries of the Deputy-Chairman, amounted to the introduction of fresh evidence, which was a further irregularity at that stage of the proceedings, and the evidence given was inaccurate, which was all the more serious in that it related to a highly relevant topic. Again, the presence of the shorthand writer in the jury room was a further irregularity.

Michael Parker, for the Crown.

What passed between the Deputy-Chairman and the jury, in the absence of the appellant and counsel, must be regarded as irregular. The importance of the dates when repayments of the money lent were made had been emphasised in the summing-up and all the relevant evidence clearly put before the jury.

HILBERY J.: The appellant was convicted on January 5, 1960, at the East Kent Quarter Sessions before the Deputy-Chairman on three counts of obtaining money by false pretences, all the three sets of false pretences being laid as having been made in July 1957. The nature of the false pretences was obtaining loans on the security of rings falsely represented to be of considerable value when in fact they were worth very little indeed, the false pretence which is known in criminal circles as ring dropping.

In the course of the trial great stress was laid by the defence on the fact, as was elicited from the witnesses for the prosecution, that every penny of the money thus obtained had been repaid since the time when it was obtained and, indeed, not only repaid in full but with some small amounts for interest, and that that was an important matter for the consideration of the jury was emphasised in the summing-up by the learned Deputy-Chairman. He drew the attention of the jury particularly to the consideration of the question whether those repayments began before the appellant could have known through the police interviewing him that they were on the track of this matter. In those circumstances, of course, the dates when the repayments began to be made became highly relevant. The evidence was that the appellant had in fact begun to make the repayments in the same month, July 1957, in which the alleged false pretences were made, and that in July and August he had begun by instalments to repay the sums which he had thus obtained by false pretences. The evidence was that the police first interviewed him on the matter in September. He had, therefore, begun to make the repayments before any interview with the police.

After a summing-up which is no longer criticised, and after the jury had retired, the jury apparently asked a question. Whether the Clerk of the Peace went in to ask if they wanted

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any further help or not is not quite clear on the affidavit evidence before us, but at any rate a question was passed from the jury to the Deputy-Chairman, and it apparently related to certain counterfoils of postal orders which Mr. Wigoder, defending counsel, had been handling in the sight of the jury in the course of cross-examining the witnesses for the prosecution, I think on the subject of the repayments made to them. That it was in the jury's mind that it was important to know the earliest dates on which these repayments were made I think is obvious from the nature of the first question they were asking. They were apparently asking if they could see the counterfoils. To that question, apparently conveyed orally to the Deputy-Chairman, the Deputy-Chairman sent an answer without consulting anybody and without calling the prisoner or counsel back into court. He answered it to the effect that the jury must proceed with the evidence that was before them and those counterfoils were not in evidence before them and could not be put in front of them, that answer being sent to the jury by the mouth of the clerk. Something further occurred and, to my mind, the order in which these things took place is a little obscured, but some question was obviously being asked by the jury about what dates were on the counterfoils. Apparently Mr. Wigoder for the defence was told that a question had been asked by the jury about dates on the counterfoils and that the jury had been told that the counterfoils were not dated. That is, as far as is known, what passed, but for some reason which we have been unable to discover not only did the Clerk of the Peace go to the jury room with the answers to these questions, but he appears to have been accompanied by a shorthand writer. We have now in front of us a transcript of what passed when the Clerk of the Peace and the shorthand writer went into the jury room, and the transcript reads thus: The Clerk of the Peace said: " Ladies and gentlemen, I am instructed to say that the registered letter counterfoils have not been put in. You have all the exhibits in front of you now and therefore they cannot be put in front of you. The learned Deputy-Chairman says that you can take it for granted that it has not been disputed that all payments have been made." Then the foreman of the jury said: "May I ask if at any stage we were given the actual date at which that money was received? That is the point." That had reference to the money being received by those who had parted with their money, induced by the false pretences so to do. The clerk said: "I cannot say that myself. I will have to make further inquiries. I leave it with you at the moment," and then had a further consultation with the Deputy-Chairman. The clerk then apparently made a second visit to the jury room, either accompanied by the shorthand writer or having left the shorthand writer in the jury room, I do not know which, and the Clerk then said: "I have made further inquiries. The learned Deputy-Chairman has instructed me to say that the documents you saw counsel handling in court are not dated, so they would not help you. But so far as the evidence which you heard is concerned, the first payments were made in August or September 1957 and the last payments were made during 1958. There is no actual record of detail."

All this passed in the jury room between the learned Deputy-Chairman, acting through the agency of the Clerk of the Peace, and the jury. Of course the whole of these proceedings and the making of these communications to the jury without doing so in open court was wholly irregular. The question is not whether in such a case anything was in fact done or can be shown to have been done which was in the circumstances actually prejudicial to the accused. The vice of the matter is that things passed relative to the issue which the jury had to consider privately and not publicly in court. This court has over and over again emphasised the importance of the rule, that the whole direction must be given by the judge in the full light of publicity. That was said by the Lord Chief Justice (Lord Alverstone) in WILLMONT (1914) 10 Cr.App.R. 173. Again, in GREEN (1950) 34 Cr.App.R. 33; [1949] W.N. 488) it was laid down: "It is essential that any communication by a jury after retirement to the presiding judge and the answer thereto should be read out in open court in the presence of the prisoner, so that both the prosecution and the defence may be aware of their contents." It is to be observed that the court itself said that that was a bad case. The court itself said that, in quashing the conviction, they felt that they were allowing a man to escape who was obviously guilty. None the less this court quashed the conviction because after the jury had retired to consider their verdict they sent a communication to the Recorder, the precise contents of which the Recorder was subsequently unable to remember, and the Recorder received it in his private room and, thinking that it related to something with which he had already dealt, returned it to them from his room without coming back into court. The court again emphasised in the judgment given in that case ((1950) 34 Cr.App.R. 33, at p. 34) what had been said before, in the Divisional Court in R. *v.* BODMIN JUSTICES; *ex parte* MCEWEN [1947] K.B. 321, that " Any communication between a jury and the presiding judge must be read out in court, so that both parties, the prosecution and the defence, may know what the jury are asking, and what is the answer." It is at the very basis of the whole of the administration of justice in this country that everything in the course of doing justice shall be done in open court, so that everybody concerned may know precisely what has taken place and what has led either to the conviction or the acquittal, as the case may be.

I do not think it is necessary to go into any of the other cases, all of which support that broad proposition which I have put, that that irregularity of itself would be enough to make it necessary for this court to quash this conviction. But in this case the matter is worse than a mere matter of something passing between the Deputy-Chairman and the jury after the jury has gone out to consider its verdict and a communication not made in open court, because it is clear, now that we have seen this shorthand note, that not only were communications passing between the court and the jury otherwise than in public, but the communication that was made by the clerk after he said that he had made further inquiries amounted to the introduction of fresh evidence in the case. It has been laid down time and again that, once the summing-up is concluded and the jury has been enclosed, no further evidence can be adduced, but here the clerk gave what amounted to further and fresh evidence. As though that were not enough, it turns out that what he gave as further and fresh evidence was inaccurate upon this highly relevant topic of the dates when the appellant began to repay the moneys which it was said he had fraudulently obtained. What the clerk said was: " But so far as the evidence which you heard is concerned, the first payments were made in August or September 1957." That was inaccurate. The first payments had begun to be made, as I have already said, in July 1957, the very month in which the false pretences had been made, and to say that they were made in August or September was particularly unfortunate inasmuch as they were made both in July and August, and September was the month when the police had interviewed him upon this subject for the first time. Then the clerk added: " There is no actual record of detail," but there had been certain matters of record of detail which had been in evidence in the nature of receipts given and dated. Three receipts dated in August had been put in evidence and those related to payments made before ever the police for the first time interviewed the appellant. The question whether the appellant had begun to make these payments before he had reason to suspect that the police were making inquiries which might be awkward for him had been emphasised by the learned Deputy-Chairman when he said that that was an extremely important issue—the issue, that is to say, of what knowledge the appellant had in his mind at the time he was sending back these sums of money by registered post.

The vice of this case is emphasised by the fact that on a highly relevant issue, after the jury had retired, in a communication made not in open court, but privately as between the Deputy-Chairman and the jury, further evidence was given, and inaccurate evidence at that, on a relevant matter. It is a particularly good instance of the danger that is present if any communication passes between the court and the jury, after

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the jury has been enclosed, on any relevant matter on which the jury are seeking further information. If all this had taken place in open court with counsel for the prosecution and counsel for the defence present, they could immediately have seen that there was provided for the jury the proper information to answer the questions which they were asking.

There is only one other matter I have to mention, and it adds again to the vice of these proceedings. Here, for some inexplicable reason, and we can think of no reason which would be a good one, a shorthand writer accompanied the Clerk of the Peace into the jury room and seems to have remained there to record what was passing. There is no evidence that he had been ordered by the court to enter the jury room. For anybody to enter the jury room once the jury has been enclosed is, of course, to the highest degree improper, unless it be by order of the court. We have nothing to show here how it came about that this shorthand writer was taken into that jury room by or with the Clerk of the Peace, and that again is a matter of such grave irregularity as to lead to the quashing of this conviction. In all the circumstances the conviction must be quashed.

Conviction quashed.

Solicitors: Lincoln and Lincoln, for the appellant; County Prosecuting Solicitor, Maidstone, for the Crown.

BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE CASSELS AND
MR. JUSTICE DONOVAN

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Receiving—Possession—Motor-Car—Fingerprint of Prisoner on Back of Driving Mirror—No Sufficient Evidence to Go to Jury.

The appellant was convicted of receiving a motor-car. To establish possession the prosecution relied on evidence that a

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fingerprint proved to have been made by the appellant's left forefinger was found on the back of the driving mirror. Other fingerprints, which were not those of the appellant, were on the driving wheel and the door.

Held, that there was no sufficient evidence of possession of the car by the appellant, that the case should have been withdrawn from the jury at the close of the evidence for the prosecution and that the conviction must be quashed.

Appeal against conviction.

The appellant was convicted at Middlesex Quarter Sessions on February 22, 1960, of receiving a stolen motor-car and was sentenced by the Assistant Chairman (T. R. FitzWalter Butler, Esq.) to nine months' imprisonment.

The car was stolen in August 1959 and was found abandoned in October 1959 with false number plates and a false road fund licence. On the back of the driving mirror was a fingerprint proved to have been made by the appellant's left forefinger. Other fingerprints, which were not those of the appellant, were found on the driving wheel and on the inside of the door. The appellant's brother was convicted of stealing the car. When the appellant was interviewed by the police, he denied that he had ever been in the car, gave a false name and indicated a woman, who was in fact his brother's wife, as being his wife.

John Trench for the appellant. The fingerprint on the back of the driving mirror was the only evidence on which the prosecution could rely to show that the appellant was ever in possession of the car. This did not amount to evidence of control by the appellant and the case should have been withdrawn from the jury.

David Hollis for the Crown. The fingerprint of the appellant, found in the position in which it was, was evidence that the appellant had at some time driven the car, because if the appellant had been a passenger merely, it is unlikely that the left forefinger would have been used. The question whether the appellant was the driver of the car when the fingerprint was

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made was one of fact for the jury and was properly left to them.

DONOVAN J. [after stating the facts as set out above]: The prosecution at the trial sought to prove the necessary element of possession of the car by the appellant by means of the fingerprint on the driving mirror. It was said that this being caused by the appellant's left forefinger indicated that the appellant was or had been the driver of the car, because, if he were merely a passenger, it would be unlikely that the left forefinger would be used and that it would be more natural to use some finger of the right hand; and that, accordingly, if he were the driver, then prima facie he was in control of the car and, being in control of the car, was therefore, in possession of a stolen vehicle.

In our view, the mere fact that the appellant's left forefinger print was on the back of the driving mirror cannot be stretched into evidence of possession in this way. One must assume, in the first place, that the car had a right-hand drive and although the probability is that such was the case, counsel for the prosecution is unable to tell us that the fact was proved. Furthermore, the position of the fingerprint is not consistent only with it having been made by someone driving the car at the time. Someone leaning over from behind the driver to adjust the mirror might also use the left hand and, although it may be less of a probability, it cannot be dismissed as a remote possibility not even worthy of consideration. The argument for possession on the part of the appellant, based as it is on the single fingerprint alone, is altogether too rarefied to be accepted, and in our view, the Assistant Chairman should have acceded to the submission of the defence that there was no evidence of possession sufficiently satisfactory to be left to the jury.

The matter was put alternatively by the prosecution in a way which is reflected in the following passage in the summing-up: "If you should think that the defendant was not the driver of the car but was in the passenger seat and did adjust

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the mirror for the purpose of assisting the driver properly to drive the car, then you would be perfectly entitled to come to the conclusion that he was in possession of the car just as much as the driver, because he would be assisting in the control of the car." In our opinion in what was otherwise a very fair and full summing-up, that passage cannot be supported. The proposition really amounts to this, that anyone who assists in any way in the control of the car is in possession of it for the purpose of this felony just as much as the driver. Such a universal proposition is not the law. There may, of course, be cases of assistance in control which will amount to possession, but it is not the case that all such assistance is equivalent to possession. It is impossible to predicate that merely because a passenger adjusts the driving mirror for the driver that a jury is then entitled as a matter of law to draw the conclusion of dual control. One needs to know more about the circumstances before such a conclusion can properly be drawn, otherwise a person could be held to be in possession of a car merely because he wiped the inside of the windscreen for the driver or switched on the windscreen wipers.

The facts in this case were, indeed, highly suspicious. Not only did the appellant initially tell lies to the police, but he did not go into the witness-box to tell his story. It is only now that he admits that he was at some time a passenger in the car. Of course, he is entitled not to go into the witness-box if he does not want to, and while that arouses suspicion, it supplies no gaps in the evidence, and the big gap here was lack of evidence of possession. That gap should have led to the case being withdrawn from the jury at the close of the evidence for the prosecution. The appeal is, accordingly, allowed and the conviction quashed.

Conviction quashed.

Solicitor: The Solicitor, Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY, AND MR. JUSTICE DIPLOCK

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Murder—Diminished Responsibility—Abnormality of Mind—Mental Responsibility—Sexual Psychopath—Province of Jury—Right to Differ from Medical Evidence—Summing-up—Determination of Fact Withdrawn from Jury—Verdict of Manslaughter Substituted—Homicide Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 2.

" Abnormality of mind " in section 2 of the Homicide Act, 1957, covers the mind's activities in all its aspects, not only the perception of physical acts and matters and the ability to form a judgment whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment. " Mental responsibility " points to a consideration of the extent to which the prisoner's mind is answerable for his physical acts, and must include a consideration of the extent of his ability to exercise will power to control his physical acts.

Whether the prisoner was at the time of the killing suffering from any " abnormality of the mind " in the aforementioned sense is a question for the jury. While medical evidence is important on this question, the jury are entitled to take into account all the evidence, including the acts and statements of the prisoner and his demeanour. They are not bound to accept the medical evidence, if there is other material before them which, in their good judgment, conflicts with it and outweighs it. *Semble*, however, the question whether the abnormality of mind arose " from a condition of arrested or retarded development of mind or any inherent causes or [was] induced by disease or injury " is a matter to be determined by expert evidence.

Where the medical evidence showed that from an early age the prisoner had been subject to perverted violent sexual desires and had found it very difficult or perhaps impossible in some cases to resist putting the desire into practice, and that the act of killing had been done under such an impulse or urge, but that, setting aside those sexual addictions and practices, the prisoner was normal in every other respect, and the judge directed the jury that those facts with nothing more could

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not constitute a defence under section 2, and the prisoner was convicted of murder,

Held, that the direction was wrong in that it withdrew from the jury the essential determination of fact which it was their province to decide, and that a verdict of manslaughter should be substituted.

Appeal against conviction.

The appellant was convicted at Birmingham Assizes on March 24, 1960, of murder and was sentenced by Stable J. to imprisonment for life.

The victim of the murder was a young woman who had been strangled in a hostel by the appellant, who, after her death, savagely mutilated her body. The only defence was to diminished responsibility under section 2 of the Homicide Act, 1957. The uncontradicted medical evidence was that the appellant was a sexual psychopath and suffered from violent perverted sexual desires which he found it difficult or impossible to control, but that save when under the influences of these desires, he might be normal. All the doctors were of the opinion that the killing was done under the influence of his perverted sexual desires and that his sexual pyschopathy could properly be described as partial insanity. The judge directed the jury that sexual psychopathy did not come within section 2 of the Homicide Act, 1957. The material portions of the summing-up appear in the judgment.

R. K. Brown, Q.C. (*John Owen* with him) for the appellant. In view of the singularly revolting nature of the case it was most important that the judge should remove all emotion from the minds of the jury and create a strictly legal atmosphere. It is submitted that he failed in certain circumstances to apply legal principles and in others erred in the application of such principles. It was the duty of the judge to consider the words of section 2 of the Homicide Act which created the statutory defence of diminished responsibility and not attempt to redefine it, though it is conceded that he was entitled to give illustrations: WALDEN (1959) 43 Cr.App.R. 201;

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[1959] 1 W.L.R. 1008. It is difficult to draw a precise line between redefining and giving illustrations, but here the judge had clearly overstepped the boundary by limiting the operation of the section.

[THE LORD CHIEF JUSTICE: Do you say that the defence under section 2 involves an inability to control acts or conduct or the power to distinguish between right and wrong?]

The power to distinguish between right and wrong is specifically referable in the M'Naughten Rules. Under section 2 the question whether the defendant knew that what he was doing was wrong may be considered as well as the question of moral responsibility, but it can never be conclusive. "Moral responsibility" may mean that, although the defendant knew that what he was doing was wrong, he was prevented by his mental condition from controlling his impulses and the section appears to have envisaged the latter condition as falling within its ambit. The judge should have left it to the jury to say whether evidence of sexual perversion came within section 2. The general effect of his summing-up was that if the jury, on an examination of the facts, came to the conclusion that the appellant suffered from sexual perversion and nothing more, then they need not trouble about section 2. The actual facts relating to the killing may speak more conclusively than any medical evidence. It is submitted that the present case is indistinguishable from MATHESON (1958) 42 Cr.App.R. 145; [1958] 1 W.L.R. 474 and the court is asked to substitute a verdict of manslaughter on the ground of diminished responsibility.

John Hobson, Q.C. (*Elizabeth Lane, Q.C.*, with him), for the Crown.

The Crown is prepared to adopt the dictum in MATHESON (*supra*) that, if these were facts which entitle the jury to differ from the opinions expressed by medical men, the verdict cannot be disturbed. There were such facts in the present case. Even if the doctors were right in saying that the appellant

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was a sexual psychopath and even if it be conceded that such a condition may come within section 2, the medical evidence left it quite at large how much that condition affected the mental responsibility of the appellant. "Mental responsibility" may be viewed in one of two ways—either in the light of the M'Naughten Rules or in the light in which it was viewed in SPRIGGS (1958) 42 Cr.App.R. 69; [1958] 1 Q.B. 270, where there was a discussion whether a defect in emotions could amount to abnormality of mind. It is submitted that responsibility implies will, intellect and the higher function of the mind such as conscience, and the jury must look to see whether the condition of the defendant enabled him to control his mind by higher judgment or whether the abnormality substantially impaired will, intellect and conscience. The question whether the appellant had abnormalities and, if so, whether they affected his mental responsibility was ultimately one for the jury, and the jury were entitled to differ from the medical opinions on this matter. As long as there was evidence on which the jury were entitled to come to the conclusion to which they came, the conviction can be supported and it is immaterial that there may have been facts pointing in the other direction.

Cur. adv. vult.

THE LORD CHIEF JUSTICE: The appellant was convicted of murder before Stable J. at Birmingham Assizes and sentenced to imprisonment for life. The victim was a young woman whom he strangled in the Y.M.C.A. Hostel, and after her death he committed horrifying mutilations upon her dead body. The facts as to the killing were not disputed, and were admitted in a long statement made by the appellant. The only defence was that in killing his victim the appellant was suffering from diminished responsibility as defined by section 2 of the Homicide Act, 1957, and was accordingly guilty not of murder, but of manslaughter.

Three medical witnesses were called by the defence, the Senior Medical Officer at Birmingham Prison and two

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specialists in psychological medicine. Their uncontradicted evidence was that the appellant was a sexual psychopath, that he suffered from abnormality of mind, as indeed was abundantly clear from the other evidence in the case, and that such abnormality of mind arose from a condition of arrested or retarded development of mind or inherent causes. The nature of the abnormality of mind of a sexual psychopath, according to the medical evidence, is that he suffers from violent perverted sexual desires which he finds it difficult or impossible to control. Save when under the influence of his perverted sexual desires, he may be normal. All three doctors were of opinion that the killing was done under the influence of his perverted sexual desires, and although all three were of opinion that he was not insane in the technical sense of insanity laid down in the M'Naughten Rules, it was their view that his sexual psychopathy could properly be described as partial insanity.

In his summing-up the learned judge, after summarising the medical evidence, gave to the jury a direction of law on the correctness of which this appeal turns. He told the jury if on the evidence they came to the conclusion that the facts could be fairly summarised as follows: " (1) From an early age he has been subject to these perverted violent desires and in some cases has indulged his desires; (2) the impulse or urge of these desires is stronger than the normal impulse or urge of sex to such an extent that the subject finds it very difficult or perhaps impossible in some cases to resist putting the desire into practice; (3) the act of killing this girl was done under such an impulse or urge; and (4) that setting aside these sexual addictions and practices, this man was normal in every other respect," those facts with nothing more would not bring a case within the section and do not constitute such abnormality of mind as substantially to impair a man's mental responsibility for his acts. " In other words," he went on, " mental affliction is one thing. The section is there to protect them. The section is not there to give protection where there is nothing else than what is vicious and depraved." Taken by themselves, these last words are unobjectionable, but it is contended on behalf of the appellant that the direction taken as a whole involves a misconstruction of the section, and had the effect of withdrawing from the jury an issue of fact, which it was peculiarly their province to decide.

Section 2 of the Homicide Act, 1957, is dealing with the crime of murder in which there are at common law two essential elements: (1) The physical act of killing another person and; (2) the state of mind of the person who kills or is a party to the killing, namely his intention to kill or to cause grievous bodily harm. Subsection (1) of section 2 does not deal with the first element. It modifies the existing law as respects the second element, that is, the state of mind of the person who kills or is a party to the killing.

Before the passing of the Homicide Act, 1957, a person who killed or was party to a killing could escape liability for murder—as for any other crime requiring *mens rea*—if he showed that at the time of the killing he was insane within the meaning of the M'Naughten Rules, that is, " that he was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act that he was doing, or, if he did know it, that he did not know that he was doing wrong." If established, this defence negatives *mens rea* and the accused was and still is entitled to a special verdict of " guilty of the act but insane " at the time of doing the act, which is an acquittal of any crime. The test is a rigid one: it relates solely to a person's intellectual ability to appreciate: (a) the physical act that he is doing and; (b) whether it is wrong. If he has such intellectual ability, his power to control his physical acts by exercise of his will is irrelevant.

The ability of the accused to control his physical acts by exercise of his will was relevant before the passing of the Homicide Act, 1957, in one case only, that of provocation. Loss of self-control on the part of the accused so as to make him for the moment not master of his mind had the effect of reducing murder to manslaughter if: (i) it was induced by an act or series of acts done by the deceased to the accused, and (ii) such act or series of acts would have induced a reasonable man to

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lose his self-control and act in the same manner as the accused acted. (See DUFFY [1949] 1 All E.R. 932). Whether loss of self-control induced by provocation negatived the ordinary presumption that a man intends the natural ordinary consequences of his physical acts so that in such a case the prosecution had failed to prove the essential mental element in murder (namely, that the accused intended to kill or to inflict grievous bodily harm) is academic for the purposes of our consideration. What is relevant is that loss of self-control has always been recognised as capable of reducing murder to manslaughter, but that the criterion has always been the degree of self-control which would be exercised by a reasonable man, that is to say, a man with a normal mind.

It is against that background of the existing law that section 2 (1) of the Homicide Act, 1957, falls to be construed. To satisfy the requirements of the subsection the accused must show: (a) that he was suffering from an abnormality of mind; and (b) that such abnormality of mind: (i) arose from a condition of arrested or retarded development of mind or any inherent causes or was induced by disease or injury; and (ii) was such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing. "Abnormality of mind," which has to be contrasted with the time-honoured expression in the M'Naughten Rules "defect of reason," means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment. The expression "mental responsibility for his acts" points to a consideration of the extent to which the accused's mind is answerable for his physical acts, which must include a consideration of the extent of his ability to exercise will power to control his physical acts.

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Whether the accused was at the time of the killing suffering from any " abnormality of mind " in the broad sense which we have indicated above is a question for the jury. On this question medical evidence is, no doubt, of importance, but the jury are entitled to take into consideration all the evidence including the acts or statements of the accused and his demeanour. They are not bound to accept the medical evidence, if there is other material before them which, in their good judgment, conflicts with it and outweighs it. The etiology of the abnormality of mind (namely, whether it arose from a condition of arrested or retarded development of mind or any inherent causes or was induced by disease or injury) does, however, seem to be a matter to be determined on expert evidence.

Assuming that the jury are satisfied on the balance of probabilities that the accused was suffering from " abnormality of mind " from one of the causes specified in the parenthesis of the subsection, the crucial question neverthelesss arises: was the abnormality such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing? This is a question of degree and essentially one for the jury. Medical evidence is, of course, relevant, but the question involves a decision not merely whether there was some impairment of the mental responsibility of the accused for his acts, but whether such impairment can properly be called " substantial," a matter upon which juries may quite legimately differ from doctors.

Furthermore, in a case where the abnormality of mind is one which affects the accused's self-control the step between " he did not resist his impulse " and " he could not resist his impulse " is, as the evidence in this case shows, one which is incapable of scientific proof. *A fortiori* there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses. These problems which in the present state of medical knowledge are scientifically insoluble the jury can only approach in a broad, commonsense way. This court has repeatedly approved directions to

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the jury which have followed directions given in Scots cases where the doctrine of diminished responsibility forms part of the common law. We need not repeat them. They are quoted in SPRIGGS (1958) 42 Cr.App.R. 69; [1958] 1 Q.B. 270. They indicate that such abnormality as " substantially impairs his mental responsibility " involves a mental state which in popular language (not that of the M'Naughten Rules) a jury would regard as amounting to partial insanity or being on the border line of insanity.

It appears to us that the learned judge's direction to the jury that the defence under section 2 of the Act was not available, even though they found the facts set out in numbers 2 and 3 of the learned judge's summary, amounted to a direction that difficulty or even inability of an accused person to exercise will-power to control his physical acts could not amount to such abnormality of mind as substantially impairs his mental responsibility. For the reasons which we have already expressed we think that this construction of the Act is wrong. Inability to exercise will-power to control physical acts, provided that it is due to abnormality of mind from one of the causes specified in the parenthesis in the subsection is, in our view, sufficient to entitle the accused to the benefit of the section; difficulty in controlling his physical acts, depending on the degree of difficulty, may be sufficient. It is for the jury to decide upon the whole of the evidence whether such inability or difficulty has, not as a matter of scientific certainty but on the balance of probabilities, been established and in the case of difficulty whether the difficulty is so great as to amount in their view to a substantial impairment of the accused's mental responsibility for his acts. The direction in the present case thus withdrew from the jury the essential determination of fact which it was their province to decide.

As already indicated, the medical evidence of the appellant's ability to control his physical acts at the time of the killing was all one way. The evidence of the revolting circumstances of the killing and the subsequent mutilations, as of the previous sexual history of the appellant, pointed, we think plainly, to

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the conclusion that the appellant was what would be described in ordinary language as on the border line of insanity or partially insane. Properly directed, we do not think that the jury could have come to any other conclusion than that the defence under section 2 of the Homicide Act was made out.

The appeal will be allowed and a verdict of manslaughter substituted for the verdict of murder. The only possible sentence, having regard to the tendencies of the appellant, is imprisonment for life. The sentence will, accordingly, not be disturbed.

Verdict substituted.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS
AND MR. JUSTICE DONOVAN

MICHAEL HOGAN
EDWARD TOMPKINS

1960
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Prison Breach—Matter Previously Dealt with by Visiting Justices—Charges Arising from Same Matter—No Subsequent Charge to be Brought for Aggravated Offence where Circumstances Remain Same—How Far Principle Applies.

The principle laid down in ELRINGTON (1861) 1 B. & S. 688 and MILES (1890) 24 Q.B.D. 423 that when a person accused of a minor offence has been acquitted or convicted he shall not be charged on the same facts with the offence in a more aggravated form, provided that the circumstances remain the same, is still good law; but it applies only in the case of an acquittal or conviction by a court of competent jurisdiction, and does not apply where the original charge has been dealt with by a disciplinary body which is not a court.

Where, therefore, the appellants, who had escaped from prison, had been punished by the visiting committee of justices under the Prison Rules, 1949, by forfeiture of privileges, earnings, loss of remission, etc.

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Held, that this punishment was no bar to a subsequent prosecution for prison breach arising out of the same facts.

Appeals against conviction.

The appellants were convicted at Hampshire Assizes on March 23, 1960, of prison breach, aiding a prisoner to escape and resisting a police officer and were each sentenced by Hilbery J. to two years' imprisonment, concurrent on these charges, but consecutive to the respective sentences which they were then serving.

Both the appellants were serving a sentence of preventive detention at Parkhurst and planned with another prisoner named Taylor to escape. They got out through a skylight by cutting a wire underneath and were pursued by prison officers. A struggle ensued in the course of which Taylor escaped.

R. H. S. Palmer, for the appellants.

The charge of prison breach arose out of precisely the same facts as a matter which had been previously dealt with by the visiting justices and in respect of which the appellants had been punished. The charge of prison breach was that of simple escape in a more aggravated form and should, therefore, not have been brought. MILES (1890) 24 Q.B.D. 423 is an authority for this proposition, which had already been laid down in ELRINGTON (1861) 1 B. & S. 688, and should still be regarded as good law. Its effect has been modified only in cases where the consequences of the act have changed, such as in THOMAS (1949) 33 Cr.App.R. 200; [1950] 1 K.B. 26 where the person who had been wounded subsequently died. Here there was no change of circumstances and the appellants had been already dealt with for this matter by the visiting justices. The judge should not have left the charge of prison breach to the jury.

M. G. Polson, for the Crown.

The punishment imposed by the visiting justices was an administrative matter only and not the sentence of a court. There was, therefore, nothing to prevent the charge of prison breach from being brought and the judge was right in leaving it to the jury.

THE LORD CHIEF JUSTICE: These appellants were convicted at Hampshire Assizes before Hilbery J. of prison breach, aiding a prisoner to escape and resisting a peace officer. They were sentenced to two years' imprisonment on each count concurrent, but consecutive to the sentence which they were then serving. They appeal against conviction for prison breach by leave of the single judge.

The short facts were these. Both these appellants, Hogan and Tompkins, were serving a sentence of preventive detention at Parkhurst. They planned with another man called Taylor to escape, and in order to escape, the wire under a skylight, as we understand it, had to be cut. The wire was cut, and although the appellants said that somebody else had done it, the jury quite clearly took the view that whoever did it was doing it as part of this plan to escape. In due course the three of them got out of the skylight; they were pursued by some prison officers and in the course of a struggle which ensued one of the prison officers was stunned and suffered a wound on his forehead. Taylor in fact got away and was still at liberty at the time of the trial.

The indictment on which the appellants were charged consisted of five counts, first, prison breach, that is to say escaping by force; secondly, simple escape; thirdly, aiding a prisoner, Taylor, to escape; fourthly, doing grievous bodily harm to the prison officer with intent, and lastly, resisting the prison officer. To get the fourth count out of the way first, they were acquitted of doing grievous bodily harm with intent. It is not easy to see why, but the jury could not have been satisfied that they had done grievous bodily harm with intent, although they found the prisoners guilty on the fifth charge.

So far as the simple escape was concerned, Mr. Polson, the prisoners being unrepresented, perfectly properly brought to the attention of the judge the fact that the prisoners had already been dealt with by the visiting justices. In fact this was under rule 42 of the Prison Rules, 1949, subs. (13) of which provides: " A prisoner shall be guilty of an offence against discipline if he escapes from prison or from legal custody." Under rule 44 the matter was reported to the visiting committee of justices for them to inquire into it. Under that rule the visiting committee had power to determine and award thereon. Pursuant to that the visiting justices in this case, in regard to escaping from prison, made a number of awards; they ordered that the appellants should forfeit all privileges for twenty-eight days, should be excluded from associated work for twenty-eight days, should forfeit earnings for twenty-eight days and should undergo cellular confinement for fifteen days. In the case of Hogan they also awarded a No. 1 diet for fifteen days, and finally both appellants' eligibility for release was postponed for six months, by which I understand that any remission up to six months was forfeited. Thereupon the learned judge struck out that count and the appellants continued to be charged with and were convicted of prison breach.

In those circumstances the point taken on their behalf is really this, that prison breach is in effect escaping by force; in other words, it is a simple escape with aggravation, and it is said that if a man has been convicted already, albeit for a different offence, namely, for simple escape, a charge cannot be brought against him subsequently for an aggravated offence if the offences in both cases arise on exactly the same matter. That that is a principle of law is undoubtedly true, as can be seen from MILES (1890) 24 Q.B.D. 423. There a prisoner had been convicted of simple assault; later it was sought to charge him on indictment with a number of different offences, but arising out of exactly the same assault. It was put as a matter of unlawful and malicious wounding, alternatively as inflicting grievous bodily harm, and alternatively as an assault thereby occasioning actual bodily harm. Pollock B. at p. 436 referred to the judgment of Chief Justice Cockburn in ELRINGTON (1861) 1 B. & S. 688, where the Chief Justice said: " We must bear in mind the well established principle of our criminal law that a series of charges shall not be preferred, and whether a party accused of a minor offence is acquitted or convicted he shall not be charged again on the same facts in a more aggravated form.'' Hawkins J. in his judgment at p. 432 said: " The true ground upon which these decisions were based seems to me to be that the summary conviction or dismissal of the charges in each case operated as an absolute bar to any future proceedings for or in respect of the same assault; and as the aggravating circumstances, unless coupled with the assault, amounted to no crime, there was nothing to support the indictment.''

That decision, as I understand it, remains good law; the only qualification to be put upon it is that the principle does not apply where the consequences have changed. That clearly appears from the decision of this court in THOMAS (1949) 33 Cr. App.R. 200; [1950] 1 K.B. 26, where a man having been convicted of wounding with intent to murder was subsequently charged with murder, the person assaulted having in the interval died. But where the circumstances remain the same the decision, as we understand, in MILES (*supra*) is still good. Accordingly Mr. Palmer, to whose argument the court is indebted, submits that this is just such a case, and that the appellants having been dealt with by the visiting justices, the charge, albeit in the aggravated form of escaping by force, prison breach, ought not to have been left to the jury.

The court, however, feels that the principle in MILES (*supra*) is meant to apply and can only apply to the decisions of courts of competent jurisdiction. Though not strictly a case of *autrefois convict*, it is very much on those lines. It so happens that the offence created under the Prison Rules, an offence against discipline, is in fact the same as the common law offence of escape. In the present case, however, the visiting justices have dealt with the matter as an offence against discipline under the Prison Rules. They have not dealt with the common law offence of simple escape. It follows, therefore, in our judgment, that strictly Hilbery J. need not have struck out the first count for simple escape, though clearly it was the

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sensible thing to do, because, if the appellants had been convicted of simple escape alone, the learned judge, in deciding upon the sentence, would have to take into consideration what had already happened as a matter of prison discipline.

It is quite another matter to say that the appellants, having been found guilty of a breach against discipline, cannot then be charged with the common law offence of simple escape in its aggravated form as a prison breach. It seems to us that they clearly can, just indeed as the visiting justices could have dealt with the breach against discipline if that had come before them after the appellants had been convicted at assizes. The truth of the matter is that the visiting justices are dealing with matters of internal discipline with which this court is in no way concerned.

Accordingly, in our judgment, the charge of prison breach was properly left to the jury; it was for the judge to take into consideration, as no doubt he did, that the appellants had already been convicted of a breach of discipline for simple escape and had forfeited certain privileges. In our judgment, therefore, there is no ground for interfering in this case, and the appeal is dismissed. I would only add this, that if the court had found it necessary to quash the conviction in respect of prison breach, there would be no ground whatever for interfering with the sentence. The only result is that these two men have had a day out of prison.

Appeals dismissed.

[IN THE HOUSE OF LORDS]

BEFORE

THE LORD CHANCELLOR, LORD GODDARD,
LORD TUCKER, LORD DENNING AND LORD
PARKER OF WADDINGTON

DIRECTOR OF PUBLIC PROSECUTIONS *v.* SMITH

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Murder—Malice Aforethought—Intent to Do Grievous Bodily Harm—Unlawful and Voluntary Act—Grievous Bodily Harm Natural and Probable Result—Test of Ordinary Reasonable Man Applicable—Meaning of " Grievous Bodily Harm "—Summing-up—Presumption that Man Intends Natural and Probable Consequence of Act—Reference to Presumption Best Omitted.

On a charge of murder the jury should be directed that, assuming that the prisoner was in law responsible and accountable for his actions, *i.e.*, was capable of forming an intent and not insane within the M'Naughten Rules and not suffering from diminished responsibility, the sole question on the issue of intent to do grievous bodily harm is whether the unlawful and voluntary act aimed at some person which he did was of such a kind that grievous bodily harm was the natural and probable result. It is wrong to draw a distinction between grievous bodily harm which is certain to result and that which is likely to result.

" Grievous bodily harm " on a charge of murder or an offence under the Offences against the Person Act, 1861, should be given its ordinary and natural meaning of really serious bodily harm, and it is inadvisable to attempt any further definition of it.

ASHMAN (1858) 1 F. & F. 88 considered.

Though the presumption that a man intends the natural and probable consequences of his acts is applicable to the above circumstances and, once the prisoner's knowledge of the circumstances and the nature of his acts has been ascertained, can be rebutted only by proof of incapacity to form an intent, *i.e.*, insanity or diminished responsibility, any reference to such presumption is best omitted from a summing-up on a charge of murder, and the test of the ordinary reasonable man, which contains all the necessary ingredients of malice aforethought, is a simpler criterion.

STEANE (1947) 32 Cr.App.R. 61; [1947] K.B. 997 and HOSEGOOD *v.* HOSEGOOD (1950) 66 T.L.R. 735 considered.

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The doctrine of malice aforethought constituted by a proved intent to do grievous bodily harm has not been abolished or affected by section 1 (1) of the Homicide Act, 1957.

VICKERS (1957) 41 Cr.App.R. 189; [1957] 2 Q.B. 664 followed.

Appeal by the Crown from an order of the Court of Criminal Appeal quashing a conviction of capital murder and substituting a verdict of manslaughter.

The appellant was convicted at the Central Criminal Court on April 7, 1960, of capital murder of Leslie Edward Vincent Meehan, a police officer acting in the execution of his duty, and was sentenced by Donovan J. to death.

At about 7.50 p.m. on March 2 the appellant was driving his car, in the back of which were some sacks of stolen scaffolding clips. He halted at traffic lights in Beresford Square, and by chance Police-constable Meehan, with whom the appellant was on friendly terms, happened to come round and speak to him. Noticing what was in the back of the car, he told the appellant to pull over slowly to the kerb, and also told another police officer, who was controlling the traffic, to go to the police station. The appellant, instead, made off at an increasing pace down Plumstead Road. Police-constable Meehan clung on to the off-side of the car as it gained speed and pursued an erratic course, until finally he was shaken off and fell in front of an oncoming bubble car, receiving fatal injuries to his head. The distance from the point in Beresford Square where the appellant's car first started moving at a pace which could have swept the police constable off his feet to the spot where he was killed was about 100 yards and the time taken occupied about 10 seconds.

The appellant did not stop when the police-constable fell from the car, but went on for some 200 yards to a place where he dumped the stolen clips. Then he returned in the car to Beresford Square, where he told police officers : "I am the driver of the car he was hanging on to. I know the man. I would not do that for the world. I only wanted to shake him off."

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At the trial the appellant attempted to put forward a case that he had accelerated by mistake, and that he did not know the police-constable was hanging on to his car. He also said that he was scared and frightened, and in effect did not realise what he was doing. He said that the weight of the clips had possibly affected the steering, and throughout he maintained emphatically that he had no intention either of causing the police-constable any severe injury or of killing him.

The appeal was heard by the Court of Criminal Appeal (Byrne, Sachs and Winn JJ.) on May 9 and 10, 1960, when the court quashed the conviction of capital murder and substituted a verdict of manslaughter and a sentence of 10 years' imprisonment, and stated that reasons for the decision would be given later.

May 18. The judgment of the court was read by:

BYRNE J. [after stating the facts:] At the trial the appellant attempted by his evidence to put forward a case that he had put his foot on the accelerator in mistake for the brake, and that he did not realise that P.C. Meehan was hanging on to his car. In addition he said several times that he was "scared" and "frightened," and in effect did not realise what he was doing. As regards the course of his car he laid emphasis on the weight of the sacks of clips as possibly affecting the steering, and throughout he maintained emphatically that he had no intention of either causing P.C. Meehan any severe injury or of killing him. He referred to the fact that P.C. Meehan knew him quite well and was aware of his address. One of the defences raised by this evidence was that the death of the police officer in the above circumstances was a mere accident, and a considerable portion of the summing-up was devoted to this point. However, as was to be expected, the jury rejected the appellant's evidence in relation to his foot having got on to the wrong pedal and to his not knowing that the police officer was hanging on to the car. Once mere accident was excluded, there was only room for a verdict either of capital murder or of manslaughter, and the jury returned a verdict of capital murder.

On this appeal no submission has been made that there could have been in the circumstances an acquittal on the basis of there having been a mere accident. Accordingly, the sole question raised by the appeal is whether a verdict of manslaughter should be substituted for that of capital murder.

At no stage did the prosecution submit that there had been established against the appellant an actual intent to kill P.C. Meehan; and the learned judge, immediately after dealing with the defence of mere accident, stated that as regards the rest of his summing-up he proposed to assume that the jury would not find that the appellant deliberately intended to kill the police officer. Thus the issue for the jury upon the charge of murder was whether the prosecution had established that the appellant intended to cause the police officer grievous bodily harm (see VICKERS (1957) 41 Cr.App.R. 189; [1957] 2 Q.B. 664). On that issue the prosecution's case was that the above intention ought to be inferred from the appellant's conduct, whilst the case for the defence was that the appellant in fact had no such intent and that in any event the intent was not established as an inference from the facts. In the above circumstances it fell to the learned judge to direct the jury on the meaning and application to the particular facts of the maxim on which the prosecution had relied and which is often stated in the following terms: "A man must be taken (or presumed) to intend the natural consequences of his acts." This is a presumption to which the learned judge at the outset referred in the following terms: "The intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances including the presumption of law that a man intends the natural and probable consequences of his acts." Neither at that stage nor later was the jury given any explanation in general terms of the meaning or effect of the word "presumption" or that any such presumption may be rebutted.

Whatever may have been the position last century when prisoners could not go into the witness box and the distinction between presumptions of law and presumptions of fact was not so well defined, it is now clear, as was naturally conceded by Mr. Griffith-Jones, that the presumption embodied in the above maxim is not an irrebuttable presumption of law. The law on this point as it stands today is that this presumption of intention means this: that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. But, while that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts of the particular case it is not the correct inference, then it should not be drawn. The law on this topic was particularly illuminated by the following passage in the considered judgment of this court delivered by Lord Goddard C.J., sitting in the Court of Criminal Appeal with Atkinson and Cassels JJ. in STEANE (1947) 32 Cr.App.R. 61, at p. 66; [1947] K.B. 997, at p. 1004: " No doubt, if the prosecution prove an act the natural consequences of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged, but if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction; and if, on a review of the whole evidence, they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted."

As regards the various other authorities cited by Mr. Clarke on this point, care must, of course, be taken to consider the phrases therein used in relation to the particular facts. The strength of any presumption obviously varies according to particular facts and this may entail considerable adjustments in the practical terms of the charge to the jury. Thus there is a class of cases where the act of the accused must obviously cause grievous bodily harm, as where a blow with a sharp and heavy hatchet is deliberately aimed at and strikes the victim. In another class are cases where a reasonable man would realise that his act might cause grievous bodily harm, but the degree of the probability or possibility of that type of harm resulting varies according to the facts of the case. In the first class of case where the harm must obviously result from the act and there is no evidence which could be regarded as rebutting the presumption, a direction to the jury that "a man must be presumed to intend the natural consequences of his act" could be apposite, in the other cases it would not. In the other cases the charge to the jury will, of course, vary according to the facts (including the degree of likelihood of grievous bodily harm being caused), but the essence of the matter remains that whilst the accused may be presumed to have intended the natural consequences of his act, the question is: "Did he actually intend them?"

Having regard to these considerations, WARD (1956) 40 Cr. App.R. 1; [1956] 1 Q.B. 351, appears to represent the high-water mark of the application of the presumption; and, indeed, in this court Mr. Clarke submitted that the decision was inconsistent with the general stream of authority. That was a case in which the court by a judgment delivered by Lord Goddard C.J. upheld the verdict of the jury on the footing that where any sane man "must have known that what he was doing would cause at least grievous bodily harm and the child died of that grievous bodily harm," then "that does amount to murder in law." In other words, the harm was certain, there was in the view of the court no evidence which could rebut knowledge of that certainty, and the inference of intention was inevitable. We think that the sentence which we have quoted contains the true ratio of the decision in that case; in so far as the summing-up which was thereby approved appears at any point to depart from that ratio, it is in our opinion to be regarded as justified by the particular facts of that case. That the above judgment ought not to be regarded as deciding that an irrebuttable presumption of law arose in cases where there was no such certainty is shown by STEANE (*supra*) in 1947. (See also LENCHITSKY [1954] Crim.L.R. 216 in which the jury had been instructed to take into account the actual intention of a feeble-minded accused.)

The final question for the jury must always be whether on the facts as a whole an actual intent to do grievous bodily harm was established, remembering of course that intent and desire are different things and that, once it is proved that an accused man knows that a result is certain, the fact that he does not desire that result is irrelevant.

Once mere accident was excluded, the present case became one in which the degree of likelihood of serious injury to the police officer depended on which of the not always consistent versions of the facts given by witnesses for the prosecution was accepted. It was one in which it could not be said that there was a certainty that such injury would result; and it was one in which there always remained the question whether the appellant really did during the relevant ten seconds realise what was the degree of likelihood of serious injury. If the jury took the view that the appellant deliberately tried to drive the body of the police officer against oncoming cars, the obvious inference was open to them that the appellant intended serious injury to result; if, however, they concluded he merely swerved or zig-zagged to shake off that officer, or if they concluded that for any reason he may not have realised the degree of danger to which he was exposing the police officer, a different situation would arise with regard to the inferences to be drawn. In the former case the jury might well have felt they were dealing with consequences that were certain; in the latter only with degrees of likelihood. In such circumstances it was essential, once the language of presumption had been used, to make it clear that a presumption can be rebutted; to explain in broad language what view of the facts might constitute a rebuttal; to point out the distinction between consequences that must and consequences that might result; and in the end to make it plain that the overall burden of proving actual intent continued to rest on the prosecution.

When one looks at the summing-up which followed the direction on the defence of mere accident, it would appear that the learned judge framed his charge to the jury upon the basis of various passages in WARD (*supra*), one at least of which appears to treat results which are likely as being on the same footing as results which are certain. In so doing, he may well have been influenced by the request of Mr. Clarke at the trial to base his directions on that particular judgment. The result, however, was that when he came to the concluding passages of the summing-up he spoke of the jury being entitled to impute guilty intent if a reasonable man would have considered results " likely " or such as " might well " flow from the acts done, and spoke thus, in our opinion, without sufficient reference to the fact that those matters provided no more than a pointer towards the solution of the ultimate question: what was the actual state of mind of the appellant? Thus phrases were used in this vital portion of the summing-up which, taken as a whole, we feel might have led the jury to consider that they were entitled to infer guilty intent from what a reasonable man would think to be likely, without sufficient warning that, if on the facts as a whole they were left in reasonable doubt whether the appellant did intend to do grievous bodily harm, then it was for the jury to acquit on the charge of capital murder. The final passages included the phrases " If you are satisfied that . . . he must as a reasonable man have contemplated that grievous bodily harm was likely to result . . . then the accused is guilty of capital murder."

Accordingly, it does not seem to us safe to assume that the jury fully understood the position as regards the relevant presumption. We have for these reasons come to the conclusion that the verdict of capital murder should not stand and that a verdict of manslaughter should be substituted.

The Crown appealed, by fiat of the Attorney-General, to the House of Lords.

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The Attorney-General, Sir Reginald Manningham-Buller, Q.C. (*Mervyn Griffith-Jones* and *Alastair Morton* with him) for the Crown. In the Court of Criminal Appeal counsel for the accused argued that Donovan J. was wrong in directing the jury (*a*) that if a reasonable man would realise that shaking a man off a car when it was accelerating in a main street with other traffic about might well be to cause serious harm, they would be entitled to impute such an intent to the accused; and (*b*) that if they were satisfied that the accused must as a reasonable man have contemplated that grievous bodily harm was likely to result to the police officer, that such harm did happen, and that the officer died in consequence, the accused was guilty of capital murder. Counsel for the accused had submitted that the test of intent to do grievous bodily harm was subjective and must be the intent in the mind of the accused, and that the introduction of the test of what a reasonable man might have thought was an objective test and was wrong. It had never been suggested that the respondent was not a reasonable man. Counsel had also said that WARD (1956) 40 Cr.App.R. 1; [1956] 1 Q.B. 351) was wrongly decided. His second point of law had been that an intent to do grievous bodily harm, when death ensued, did not suffice to constitute murder and that VICKERS (1957) 41 Cr.App.R. 189; [1957] 2 Q.B. 664, had been wrongly decided. The Court of Criminal Appeal accepted the first submission and inferentially rejected the second.

It is submitted on behalf of the Crown that Donovan J.'s direction to the jury was correct. The case for the Crown was that the accused person did acts which any reasonable person would expect to cause grievous bodily harm. The jury must have found that the appellant did acts which a reasonable man would have expected or thought likely to cause grievous bodily harm. The Court of Criminal Appeal appear to have held that, even if the jury thought that a reasonable man must have anticipated such harm, if the question had been left to them, they would or might have found that the appellant did not intend such harm on the ground that he did not foresee or contemplate the consequence of his deliberate act, and that that question relating to the specific intent of the particular defendant should have been left to the jury. It is submitted that the Court of Criminal Appeal were wrong in holding that that question should have been left to the jury. The true issue was what a reasonable man would have regarded as the natural and probable consequence of his deliberate act. Much of the judgment of the Court of Criminal Appeal was devoted to Donovan J.'s reference to the presumption of law that a man intends the natural and probable consequences of his acts and to his alleged omission to refer to the presumption as being rebuttable. [LORD TUCKER: Is it permissible to ask the accused man whether he intended to kill or to do grievous bodily harm?] Strictly no, but if it is established as a result of such a question that he did foresee the consequences of his acts, the need for any reliance on the presumption would disappear. The Court of Criminal Appeal appear to have based their judgment on the question of intent to some extent on STEANE (1947) 32 Cr.App.R. 61; [1947] 1 K.B. 997, but that was a very different case, in which the real issue was whether the necessary specific intent, namely, that of assisting the enemy, could be established where the defendant was acting to some extent under duress. The court, further, appears to have been reluctant to follow the recent decision in WARD (*supra*). [LORD DENNING: It is strange that in that case the accused man was admittedly of subnormal intelligence and yet the jury were directed to deal with him as a reasonable man.] If that case had been decided after the Homicide Act, 1957, it would have been dealt with as one of diminished responsibility. There was no need for Donovan J. to explain that the presumption was rebuttable, for no valid ground for rebutting it had appeared in the evidence. The only way of rebutting it would be by proof of insanity or diminished responsibility. Support for the proposition that intent can be established without actual foresight on the part of the defendant is to be found in PHILPOT (1912) 7 Cr.App.R. 140, which was not cited in the

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Court of Criminal Appeal. [He referred also to LUMLEY (1911) 22 Cox 635.] [LORD TUCKER: Do you say that certainty or probability is the requisite test with regard to the occurrence of grievous bodily harm?] It is a mistake to draw any line of distinction between certainty and probability; both are facets of the same issue. [THE LORD CHANCELLOR: Supposing a thief when trying to escape was upset and worried. Is that to be left out of account in estimating his view of the consequences?] Yes, just as much as the fact that he was in a temper would be irrelevant; PHILPOT (*supra*) is a clear authority on this point. The test is always an objective test and does not depend on what the accused person was thinking at the time. The Crown does not suggest that any standard of duty or any standard of the " reasonable man " should be put forward with regard to intent in murder such as would be put forward in the case of negligence. So far as intent in murder is concerned, three distinct elements have to be proved (i) the death; (ii) that death was due to an act or acts by the defendant; (iii) that the acts were done with intent to kill or to do grievous bodily harm. The objective test has to be applied only to the nature and quality of the act done by the defendant, *i.e.*, what could reasonably be expected to result from that act. [THE LORD CHANCELLOR: What standard is to be applied to the defendant's appreciation of the consequences? Is it the standard of the reasonable man, or the reasonable man in the particular situation, or the standard of the particular defendant?] No standard of his appreciation of the consequences should be applied, because it is immaterial. If the defendant intentionally did an act which in all the circumstances a reasonable man would say was calculated to cause grievous bodily harm and intended to do that act to someone, the intent is established. Once the nature of the act has been established, the degree of expectation is immaterial. To drive the car with the intent of shaking the policeman off with such violence as to shake him off was an intent to cause grievous bodily harm and Donovan J. correctly directed the jury on that issue.

Edward Clarke, Q.C., for the respondent Smith. The task of counsel for the respondent is threefold: (i) to persuade the House to dismiss the appeal and affirm the verdict of manslaughter, which involves persuading the House that Donovan J. misdirected the jury both in law and in fact; (ii) to support the judgment of the Court of Criminal Appeal, which has been considerably criticised by the Attorney-General; (iii) to assist the House in formulating the proper direction on intent on a charge of murder for the future and on the consideration of the question whether the direction of the judge in WARD (*supra*) was correct. It is submitted that Donovan J.'s summing-up was wrong in three respects: first, in telling the jury that, if they concluded that a reasonable man would realise that the appellant's act might well cause serious harm to the police officer, they would be entitled to impute to him the intent requisite to constitute capital murder. The misdirection was the more serious in that it occurred at the very end of the summing-up. The proper test was not the objective test of what a reasonable man could or would have intended, but the subjective test of what the appellant himself had in his mind and what he intended. Secondly, at the beginning of the summing-up the judge referred to "the presumption of law that a man intends the natural and probable consequences of his acts." That, standing by itself, was a misdirection, or a non-direction. He should have added that, whatever kind of presumption it was, it was rebuttable and could only be acted on as a presumption if there were no evidence to dispute it. In the present case there was some evidence to dispute it, however weak it might be. Thirdly, the judge misdirected the jury in telling them that, if they were satisfied that the appellant had an intent seriously to interfere with the comfort of the police officer, they should convict of capital murder. The intent requisite to constitute malice aforethought in murder is an intent either to kill or to do any act obviously dangerous to life. In the interests of the community the law with regard to murder should be definite and there is no authority on the meaning of the words "grievous bodily harm" binding on this House. The proposition that an act which is calculated seriously to interfere with the victim's comfort can amount to grievous bodily harm can be traced back to ASHMAN (*supra*), where the prisoner shot at a clergyman with a shot gun and grains of gunpowder became embedded in the victim's forehead. The judge directed the jury that they were bound to find an intent to do grievous bodily harm, but the jury did not follow the judge's direction and the prisoner was acquitted of the more serious charge and convicted only of aggravated assault. However, owing to passages in *Archbold*, that direction has always been followed ever since, but not with complete strictness, because some judges have added words to the effect that there must be a deliberate act on the part of the prisoner. In the present case, however, Donovan J. followed the direction in ASHMAN (*supra*) in its most stringent form and repeated it on several occasions. [LORD TUCKER: In the present case could a reasonable man have contemplated only some minor damage to the police officer which would fall short of the high standard which you contend is required to constitute murder?] If the bubble car had not run over the officer, his injuries might have been comparatively trivial. Further, it is submitted that the Attorney-General was wrong when he contended that on a charge of murder the accused person could not be heard to say that he had no intent to cause grievous bodily harm if the circumstances were such that a reasonable man would have realised that grievous bodily harm would follow, and that the state of mind of the reasonable man must be imputed to the defendant unless he was suffering from insanity or diminished responsibility or unless there was provocation. In charges of wounding with intent to cause grievous bodily harm under section 18 of the Offences against the Person Act, 1861, or of offences involving intent to defraud, the proper test, and test which has been generally adopted, is: what did the accused man himself intend to do? It would be harsh and wrong to introduce into charges of murder based on intent to do grievous bodily harm the test of the reasonable man. Even if the test of the reasonable man is to be introduced, it must be the test of the reasonable man placed in the circumstances of the defendant, which the judge never adopted in the present case, and the test should be used only as a guide and not as an implication. PHILPOT (*supra*) and WARD (*supra*) should not be followed. The proper direction is to refer to the intent of the defendant, without referring to the test of the reasonable man. This can be done in all cases without causing any embarrassment and the application of the test of the reasonable man is calculated to cause hindrance or confusion. Finally, the direction of Donovan J. with regard to the presumption of law that a man intends the natural and probable consequences of his acts without pointing out that the presumption is rebuttable was in itself a serious misdirection.

Miss Audrey Jennings, following for the respondent. The Australian decision of MILLER (1951) 51 Vict.L.R. 546 is of assistance with regard to the proper definition of grievous bodily harm. In that case the court held that the phrase bore its ordinary and natural meaning and that it was a misdirection, when directing a jury on the intent necessary to constitute murder, to tell them that it meant some serious interference with bodily health and comfort. [THE LORD CHANCELLOR: That is certainly an interesting decision, but it must be related to the relevant Australian Act. In this country the phrase has been used in successive Acts and a meaning in the nature of a term of art has been attached to the phrase. The House must proceed on the rule that legislation using the same phrase must be assumed to give it the same meaning, unless a contrary intention appears.]

D. B. Watling also appeared for the respondent.

[LORD PARKER OF WADDINGTON: The House would like to hear the Crown's submission on the proper method of explaining that phrase to the jury, whether the offence be murder or a statutory offence under the Offences against the Person Act, 1861.]

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), in reply. The safe way is to tell a jury that " grievous " means exactly the same as " serious." " Bodily harm " needs no explanation, but may be described as being equivalent to " injury." This was the manner in which Donovan J. more than once explained the matter to the jury. There is no authority for the proposition that the subjective test is the appropriate one on the question of intent other than the decision of the Court of Criminal Appeal in the present case. Such a view would lead to extraordinary results and in every case the jury would have to consider the degree of intelligence of the defendant, the celerity or otherwise of his mental reaction, and the time for reflection with regard to the full consequences of the act. If the decision of the Court of Criminal Appeal and argument for the respondent is right, the House will be forced to hold that directions given by judges in the various cases which have been cited were wrong.

[The House took time for consideration.]

July 28. The following opinions were read:

THE LORD CHANCELLOR: My Lords, the respondent, Jim Smith, was convicted on April 7, 1960, of the wilful murder on March 2, 1960, of Leslie Edward Vincent Meehan, a police officer acting in the execution of his duty. Such a crime constitutes capital murder under section 5 of the Homicide Act, 1957, and accordingly the respondent was sentenced to death. There was never any suggestion that the respondent meant to kill the police officer, but it was contended by the prosecution that he intended to do the officer grievous bodily harm as a result of which the officer died.

In his final direction to the jury the trial judge, Donovan J. said: " If you are satisfied that . . . he must as a reasonable man have contemplated that grievous bodily harm was likely to result to that officer . . . and that such harm did happen and the officer died in consequence, then the accused is guilty of capital murder. . . . On the other hand, if you are not satisfied that he intended to inflict grievous bodily harm upon the officer—in other words, if you think he could not as a reasonable man have contemplated that grievous bodily harm would result to the officer in consequence of his actions—well, then, the verdict would be guilty of manslaughter." The respondent appealed to the Court of Criminal Appeal alleging misdirection by the trial judge, the main ground being that the direction cited above was wrong in that the question for the jury was what he, the respondent, in fact contemplated. The appeal was heard by the Court of Criminal Appeal on May 9 and 10, 1960, when the court allowed the appeal, substituted a verdict of guilty of manslaughter, and imposed a sentence of 10 years' imprisonment. The court gave its reasons on May 18, 1960. They upheld the respondent's contention, holding that "There always remained the question whether the appellant" (the present respondent) "really did . . . realise what was the degree of likelihood of serious injury." Thereupon the Attorney-General gave his fiat certifying that the appeal of Jim Smith involved a point of law of exceptional public importance and that in his opinion it was desirable in the public interest that a further appeal should be brought. The matter now comes before your Lordships' House on the appeal of the Director of Public Prosecutions. The appeal certainly involves an important question, raising, as it does, the question as to what is the proper direction to be given to a jury in regard to the necessary intent which has to be proved in cases of murder and also in cases under section 18 of the Offences against the Person Act, 1861.

The facts can be summarised as follows: At about 7.30 p.m. on March 2, 1960, the respondent, accompanied by a man named Artus, was driving a Ford Prefect motor-car through Woolwich. In the boot and the back of the car were sacks containing scaffolding clips that they had just stolen. The car

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was stopped in Beresford Square by the police officer on point duty in the normal course of traffic control and while so stopped P.C. Meehan, who was acquainted with the respondent, came to the driver's window and spoke to him. No doubt as a result of what P.C. Meehan saw in the back of the car he told the respondent when the traffic was released to draw in to his nearside. The respondent began to do so and P.C. Meehan walked beside the car. Suddenly, however, the respondent accelerated along Plumstead Road and P.C. Meehan began to run with the car, shouting to the officer on point duty to get on to the police station. Despite the fact that the respondent's car had no running board, P.C. Meehan succeeded in hanging on and never let go until some 130 yards up Plumstead Road when he was thrown off the car and under a bubble car coming in the opposite direction, suffering a crushed skull and other injuries from which he died.

What happened during the time the car travelled that 130 yards was the subject of considerable evidence. The police officer on traffic duty, P.C. Baker, said that he last saw the car doing what he thought was about 20 miles per hour with P.C. Meehan running and holding on to it. Mr. Doran, a bus driver, whose vehicle had also been held up in Beresford Square, said that the respondent's car suddenly accelerated with P.C. Meehan holding on to it; that it started to zig-zag; and that the police officer appeared to be thrown across the bonnet of the car. Mr. Lynch, who was standing in the centre of the square, said that the car suddenly accelerated, zig-zagging all the time, the police officer holding on, his feet hanging on the ground; that it kept on accelerating and he thought he saw the right hand of someone in the car trying to push the officer off. He thought that the car reached a speed of 30–60 miles per hour. Four cars were coming in the opposite direction. The driver of the first car, a Mr. Gill, said that the respondent's car appeared to come at him at a fast to medium speed. There appeared to be someone on the car either falling from the driver's seat or picked up on the bonnet. He felt a

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slight bump on the rear of his car but sufficient to make him stop. The driver of the second car, a Mr. Mills, said that he saw the respondent's car gathering speed and swerving towards him. The side of his car was struck. The driver of the third car, a Mr. Eldridge, thought that the respondent's car was travelling at about 40–50 miles per hour; he saw what he could only describe as an object hanging on below the driver's window. His car was struck violently, the offside front mudguard being bashed in. Having regard to the fact that there were no marks on the respondent's car, the inevitable conclusion is that the contact of all three cars was with P.C. Meehan. Mr. Rollingson, the driver of the fourth car, a bubble car, said that the respondent's car was going very fast and swerving. He saw something coming towards him; there was a terrific crash and he stopped and P.C. Meehan was underneath his car. The respondent's car went tearing up the road. Mr. Heywood, a cyclist, who was ahead of the respondent's car and was passed by the car just after P.C. Meehan was thrown off, described the car as going fast. Finally, Artus, the passenger in the respondent's car, described how the officer was holding on to the door by the driver's window with his left hand and was banging the windscreen with his right hand. He said that the respondent said: "Let go, Bert."

After P.C. Meehan had been thrown off, the respondent drove his car a little further up Plumstead Road and into a side turning where he and Artus threw the sack of clips out of the car. Artus then went off, but the respondent returned to the scene. According to P.C. Weatherill, the respondent first asked: "Is he dead?" and then on being told that it was believed so he said: "I knew the man, I wouldn't do it for the world. I only wanted to shake him off." The respondent, however, denied that he had spoken the last few words. The respondent was taken to the police station. On being arrested and cautioned he said: "I didn't mean to kill him, but I didn't want him to find the gear." The respondent then made and signed a statement in which, *inter alia*, he said: "P.C. Meehan jumped on the side of the car and I got frightened. I don't know what I got frightened about. I don't think I thought of the stolen gear I had on board. I don't know what I did next in respect of driving the car. All I know is when he fell off he must have been hurt. I knew he fell off, and I then took a turning off the Plumstead Road. I drove up this turning some way and turned right down a back street. I stopped the car in this back street, as George wanted to get out of it. I got out too and chucked the gear out of the car on to the pavement. I got rid of it, because I was scared the police would find it in my motor."

The respondent gave evidence at the trial. He said that when P.C. Meehan jumped on the side of the car, his foot went down on the accelerator and he was scared. "I was scared very much. I was very much frightened." He agreed that he did not take his foot off the accelerator. "I never thought of it, sir. I was frightened. I was up in the traffic. I never thought of it. It happened too quick." Asked why he did not take his foot off the accelerator, he said: "I would have done, but when he jumped on the side he took my mind off what I was doing." "When he jumped on I was frightened. I was up the road before it happened. It all happened in a matter of seconds." He further said that when going up Plumstead Road he didn't realise that the officer was still hanging on to the car. Asked about his car swerving he said: "My motor was swaying because of the load in the back."

In this state of the evidence the defence was two-fold—(1) That he did not realise the officer was hanging on to the car until the officer fell off and that he could not keep a straight course having regard to the weight of metal in the back. In other words, he raised the defence of accident; (2) alternatively, that it was a case of manslaughter and not murder in that he had no intent to kill or to do grievous bodily harm. As regards the defence of accident, the learned judge went through the relevant evidence and ended by saying this: "There is a limit, is there not, members of the jury, to human credulity, and you may think that the accused man's unsupported assertion on this part of the case goes well past it, that the evidence is overwhelming, and he knew his car was carrying the officer up the road? The matter is one for you, but if you arrive at the conclusion that, of course, he knew, it is one which I would regard as abundantly right. Indeed, on the evidence I do not see how you could properly arrive at any other conclusion. If that be so, the defence of pure accident goes." My Lords, it would seem that this observation was fully justified on the evidence and the jury by their verdict must have rejected the possibility of accident. Indeed the defence of accident was never suggested either in the Court of Criminal Appeal or in your Lordships' House.

It is in regard to the second defence that the summing-up of the learned judge has been criticised and indeed has been held to amount to a misdirection by the Court of Criminal Appeal. It is said that the jury were misdirected as to the intent which has to be proved in order to constitute the necessary ingredient of malice. The passages complained of are these: "The intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances including the presumption of law that a man intends the natural and probable consequences of his acts." "If you feel yourselves bound to conclude from the evidence that the accused's purpose was to dislodge the officer, then you ask yourselves this question: Could any reasonable person fail to appreciate that the likely result would be at least serious harm to the officer? If you answer that question by saying that the reasonable person would certainly appreciate that, then you may infer that that was the accused's intention, and that would lead to a verdict of guilty on the charge of capital murder." "Now the only part of that evidence of Police Constable Weatherill which the accused challenges is the part that incriminates him, namely, 'I only wanted to shake him off.' He says he did not say that. Well, you may think it is a curious thing to imagine, and further it may well be the truth—he did only want to shake him off; but if the reasonable man would realise that the effect of doing that might well be to cause serious harm to this officer, then, as I say, you would be entitled to impute such an intent to the accused, and, therefore, to sum up the matter as between murder and manslaughter, if you are satisfied that when he drove his car erratically up the street, close to the traffic on the other side, he must as a reasonable man have contemplated that grievous bodily harm was likely to result to that officer still clinging on, and that such harm did happen and the officer died in consequence, then the accused is guilty of capital murder, and you should not shrink from such a verdict because of its possible consequences." "On the other hand, if you are not satisfied that he intended to inflict grievous bodily harm upon the officer—in other words, if you think he could not as a reasonable man have contemplated that grievous bodily harm would result to the officer in consequence of his actions—well, then, the verdict would be guilty of manslaughter."

The main complaint is that the learned judge was there applying what is referred to as an objective test, namely, the test of what a reasonable man would contemplate as the probable result of his acts, and therefore would intend, whereas the question for the jury, it is said, was what the respondent himself intended. This indeed was the view of the Court of Criminal Appeal, who said: "Once mere accident was excluded, the present case became one in which the degree of likelihood of serious injury to the police officer depended on which of the not always consistent versions of the facts given by witnesses for the prosecution was accepted. It was one in which it could not be said that there a certainty that such injury would result; and it was one in which there always remained the question whether the appellant really did during the relevant ten seconds realise what was the degree of likelihood of serious injury. If the jury took the view that the appellant deliberately tried to drive the body of the police officer against oncoming cars, the obvious inference was open to them that the appellant intended serious injury to result; if, however, they concluded he merely swerved or zig-zagged to shake off that officer, or if they concluded that for any reason he may not have realised the degree of danger to which he was exposing the police officer, a different situation would arise with regard to the inferences to be drawn. In the former case the jury might well have felt they were dealing with consequences that were certain; in the latter only with degrees of likelihood."

Putting aside for a moment the distinction which the Court of Criminal Appeal were seeking to draw between results which were "certain" and those which were "likely," they were saying that it was for the jury to decide, whether having regard to the panic in which he said he was, the respondent in fact at the time contemplated that grievous bodily harm would result from his actions or indeed whether he contemplated anything at all. Unless the jury were satisfied that he in fact had such contemplation, the necessary intent to constitute malice would not, in their view, have been proved. This purely subjective approach involves this, that if an accused said that he did not in fact think of the consequences and the jury considered that that might well be true, he would be entitled to be acquitted of murder. My Lords, the proposition has only to be stated thus to make one realise what a departure it is from that upon which the courts have always acted. The jury must, of course, in such a case as the present make up their minds on the evidence whether the accused was unlawfully and voluntarily doing something to someone. The unlawful and voluntary act must clearly be aimed at someone in order to eliminate cases of negligence or of careless or dangerous driving. Once, however, the jury are satisfied as to that, it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions, *i.e.*, was a man capable of forming an intent, not insane within the McNaghten Rules and not suffering from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary, responsible man would in all the circumstances of the case have contemplated as the natural and probable result. That indeed has always been the law and I would only make a few citations.

The true principle is well set out in that persuasive authority *The Common Law* by Holmes J. After referring to Stephen's *Digest of the Criminal Law* and the statement that foresight of the consequence of the act is enough, he says at p. 53: "But again, What is foresight of consequences? It is a picture of a future state of things called up by knowledge of the present state of things, the future being viewed as standing to the present in the relation of effect to cause. Again, we must seek a reduction to lower terms. If the known present state of things is such that the act done will very certainly cause death, and the probability is a matter of common knowledge, one who does the act, knowing the present state of things, is guilty of murder, and the law will not inquire whether he did actually foresee the consequences or not. The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen," and again at p. 56: "But furthermore, on the same principle, the danger which in fact exists under the known circumstances ought to be of a class which a man of reasonable prudence could foresee. Ignorance of a fact and inability to foresee a consequence have the same effect on blameworthiness. If a consequence cannot be foreseen, it cannot be avoided. But there is this practical difference, that whereas, in most cases, the question of knowledge is a question of the actual condition of the defendant's consciousness, the question of what he might have foreseen is determined by the standard of the prudent man, that is, by general experience."

In FAULKNER (1877) 13 Cox 550 the Court of Crown Cases Reserved for Ireland upheld a conviction for arson of a sailor who, with intent to steal, tapped a cask of rum. He was holding a lighted match and the rum caught fire and the vessel was destroyed. Palles C.B., at p. 561, said: "In my judgment the law imputes to a person who wilfully commits a criminal act an intention to do everything which is the probable consequence of the act constituting the *corpus delicti* which actually ensues. In my opinion this inference arises irrespective of the particular consequence which ensued being or not being foreseen by the criminal, and whether his conduct is reckless or the reverse. This much I have deemed it right to say to prevent misconception as to the grounds upon which my opinion is based." In LUMLEY (1911) 22 Cox 635 Avory J. directed the jury in these terms: "When he did the act, did he contemplate, or must he as a reasonable man have contemplated, that death was likely to result, or must he as a reasonable man have contemplated that grievous bodily harm was likely to result? If, in your opinion, he must as a reasonable man have contemplated either of those consequences, then your duty is to find him guilty of murder." In PHILPOT (1912) 7 Cr.App.R. 140 the accused had strangled his wife. In evidence he said: "Something seemed to snap in my head, and I jumped up and caught her by the throat. I lost control of myself altogether. I did not know what I was doing exactly: I felt as if I was holding a very strong galvanic battery, and wanted to leave go, and could not." The real issue was whether or not he was sane at the time. The jury found that he was sane and that he acted in a fit of temper without intending to kill her. In answer to a question from the judge the foreman said: "The jury are unanimously and emphatically of opinion that at the moment of the act the prisoner did not realise the consequences of what he was doing." The judge then asked them to reconsider their verdict, saying that a man is held to intend the consequences of his act and as a result the jury found the accused guilty of murder. The Court of Criminal Appeal (consisting of Lord Alverstone C.J., Hamilton J. and Lush J.) in dismissing the appeal said (at p. 143): " The jury found that he killed her in a fit of temper; they added that he did not realise the consequences of his act, but they cannot have meant that he began to do a harmless act, or one but little blameworthy, which afterwards developed into something causing death. They must have meant that the failure to realise the consequences was due to the fit of temper. In the circumstances it was not a misdirection to tell the jury that a man is held to intend the consequences of his act. The only act in question was that which caused death, and the appellant who committed this act, if sane, must be held to have intended that consequence."

In DIRECTOR OF PUBLIC PROSECUTIONS *v.* BEARD (1920) 14 Cr.App.R. 159; [1920] A.C. 479 your Lordships' House had to consider how far evidence of drunkenness could be taken into consideration in order to determine whether the accused had the necessary intent. Reference was made to MEADE (1909) 2 Cr.App.R. 54; [1909] 1 K.B. 895 in which the Court of Criminal Appeal had said that it was a defence if it was shown that the accused's mind was so affected by drink that he was incapable of knowing that what he was doing was dangerous. In dealing with that case Lord Birkenhead L.C. in his speech at pp. 196 and 503 of the respective reports, said: " Your Lordships have had the advantage of a much more elaborate examination of the authorities upon which the rule is founded than was placed before the Court of Criminal Appeal, and I apprehend can have no doubt that the proposition in MEADE's case (*supra*) in its wider interpretation is not, and cannot be, supported by authority. The difficulty has arisen largely because the Court of Criminal Appeal used language which has been construed as suggesting that the test of the condition of mind of the prisoner is not whether he was incapable of forming the intent but whether he was incapable of foreseeing or measuring the consequences of the act."

Coming to more recent times, the judgment of the Court of Criminal Appeal in WARD (1956) 40 Crim.App.R. 1; [1956] 1 Q.B. 351; is to the same effect. At p. 5 Lord Goddard C.J. said: " Of course, the test must be applied to all alike, and the only measure one can bring to bear in these matters is what a reasonable man would contemplate or would not contemplate. If the act is one with regard to which the jury can find that a reasonable man would say: 'It would never occur to me that death or grievous bodily harm would result,' then the jury can find the prisoner guilty of manslaughter; but if they come to the conclusion that any reasonable person, that is to say, a person who cannot set up a plea of insanity, must have known that what he was doing would cause at least grievous bodily harm and that the child died of that grievous bodily harm, then a verdict of murder is justified and that does amount to murder in law."

Indeed the only case which could possibly be said to support the view taken by the Court of Criminal Appeal in the present case is VAMPLEW (1862) 3 F. & F. 520 in which a young girl of thirteen was charged with the wilful murder of an infant about ten weeks' old by administering poison. In summing up, Pollock C.B. directed the jury that: " the crimes of murder and manslaughter were in some instances very difficult of distinction. The distinction which seemed most reasonable consisted in the consciousness that the act done was one which would be likely to cause death. No one, however, could commit murder without that consciousness. The jury must be satisfied, before they could find the prisoner guilty, that she was conscious, and that her act was deliberate. They must be satisfied that she had arrived at that maturity of the intellect which was a necessary condition of the crime charged." It is clear, however, from the argument in the case and indeed from the last sentence of the direction of the Chief Baron that the real issue in the case was whether by reason of her age the accused had the necessary *mens rea.* Indeed it is so cited in *Archbold*, 34th ed., paras. 28 and 2472.

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My Lords, the law being as I have endeavoured to define it, there seems to be no ground upon which the approach by the trial judge in the present case can be criticised. Having excluded the suggestion of accident, he asked the jury to consider what were the exact circumstances at the time as known to the respondent and what were the unlawful and voluntary acts which he did towards the police officer. The learned judge then prefaced the passages of which complaint is made by saying in effect that if in doing what he did he must as a reasonable man have contemplated that serious harm was likely to occur then he was guilty of murder. My only doubt concerns the use of the expression " a reasonable man," since this to lawyers connotes the man on the Clapham omnibus by reference to whom a standard of care in civil cases is ascertained. In judging of intent, however, it really denotes an ordinary man capable of reasoning who is responsible and accountable for his actions and this would be the sense in which it would be understood by a jury.

Another criticism of the summing-up and one which found favour in the Court of Criminal Appeal concerned the manner in which the trial judge dealt with the presumption that a man intends the natural and probable consequences of his acts. I will cite the passage again : " The intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances including the presumption of law that a man intends the natural and probable consequences of his acts." It is said that the reference to this being a presumption of law without explaining that it was rebuttable amounted to a misdirection. Whether the presumption is one of law or of fact or, as has been said, of commonsense, matters not for this purpose. The real question is whether the jury should have been told that it was rebuttable. In truth, however, as I see it, this is merely another way of applying the test of the reasonable man. Provided that the presumption is applied, once the accused's knowledge of the circumstances and the nature of his acts have been ascertained, the only thing that could rebut the presumption would be proof of incapacity to form an intent, insanity or diminished responsibility. In the present case, therefore, there was no need to explain to the jury that the presumption was rebuttable.

Strong reliance was, however, placed on the case of STEANE (1947) 32 Cr.App.R. 61; [1947] K.B. 997 in which Lord Goddard C.J., at pp. 66 and 1004 of the respective reports, said: "No doubt, if the prosecution prove an act the natural consequences of which would be a certain result and no evidence or explanation is given, then a jury may on a proper direction find that the prisoner is guilty of doing the act with the intent alleged, but if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if on a review of the whole evidence they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted." That, however, was a very special case. The appellant had been charged and convicted of doing acts likely to assist the enemy, with intent to assist the enemy. His case was that, while he might have done acts likely to assist the enemy, he had only done so out of duress and in order to save his wife and children. Accordingly, this was a case where over and above the presumed intent there had to be proved an actual intent or, it might be said, a desire by the appellant to assist the enemy.

It was also said that the Court of Criminal Appeal were right in stating the law thus: "The law on this point as it stands today is that this presumption of intention means this: that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. But, while that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts of the particular case it is not the correct inference, then it should not be drawn." This passage in the judgment of the

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Court of Criminal Appeal seems to have been lifted verbatim from the judgment of Denning L.J. (as he then was) in HOSEGOOD *v.* HOSEGOOD (1950) 66 T.L.R. 735 at p. 738, a case dealing with proof of constructive desertion. In that case my noble and learned friend, Lord Denning, was approving the school of thought which said that a husband is not to be found guilty of constructive desertion, however bad his conduct, unless he had in fact an intention to bring the married life to an end. Accordingly the words in that passage were being used in connection with a case where an actual or overall intent or desire was involved. No such overall intent or desire is involved in the consideration of intent to kill or to do grievous bodily harm. Thus an overall intent or desire, *e.g.*, an intent or desire to escape, could not afford any defence. While, however, I can see no possible criticism of the trial judge in regard to the use he made of the presumption in the present case, I cannot help feeling that it is a matter which might well be omitted in summing up to a jury. The phrase " presumption of law " and the reference, if it has to be made, to the presumption being " rebuttable " are only apt to confuse a jury. In my opinion the test of the reasonable man, properly understood, is a simpler criterion. It should present no difficulty to a jury and contains all the necessary ingredients of malice aforethought.

Before leaving this part of the case I should mention that the Court of Criminal Appeal in their judgment drew a distinction between serious harm which was " certain " to result and serious harm which was " likely " to result. In their judgment, if serious harm was certain to result, the presumption could safely be relied upon and there was no need for the judge to tell the jury that it was rebuttable. On the other hand, if serious harm was only a likely consequence a judge should, in their opinion, tell the jury that the presumption was rebuttable and that it was for them to determine whether the accused in fact intended to inflict serious harm. My Lords, there is, in my opinion, no warrant for such a distinction and no authority can be adduced in support thereof. Indeed, counsel for the

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respondent did not in your Lordships' House seek to support the distinction. The Court of Criminal Appeal apparently based their opinion on the passage which I have already cited in the judgment given by Lord Goddard C.J. in WARD's case (*supra*), in which the words " must have known that what he " was doing would cause at least grievous bodily harm " occur. They treated these words as the true ratio of the decision in WARD's case (*supra*), whereas the case really decided that the direction to the jury was correct—a direction which had used the word " likely " not " certain." It seems clear that Lord Goddard was not considering the distinction which the Court of Criminal Appeal have drawn. In my opinion, the true question in each case is whether there was a real probability of grievous bodily harm.

The last criticism of the summing-up which was raised before your Lordships was in regard to the meaning which the learned judge directed the jury was to be given to the words " grievous bodily harm." The passages of which complaint is made are the following: " When one speaks of an intent to inflict grievous bodily harm upon a person, the expression ' grievous bodily harm ' does not mean for that purpose some harm which is permanent or even dangerous. It simply means some harm which is sufficient seriously to interfere with the victim's health or comfort. In murder the killer intends to kill, or to inflict some harm which will seriously interfere for a time with health or comfort. If the accused intended to do the officer some harm which would seriously interfere at least for a time with his health and comfort, and thus perhaps enable the accused to make good his escape for the time being at least, but that unfortunately the officer died instead, that would be murder too." The direction in these passages was clearly based on the well-known direction of Willes J. in ASHMAN (1858) 1 F. & F. 88 and on the words used by Graham B. in COX (1818) R. & R. 362. Indeed this is a direction which is commonly given by judges in trials for the statutory offence under section 18 of the Offences Against the Person Act, 1861, and has on occasions been given in murder trials, *cf.* VICKERS' case, *vide infra.*

My Lords, I confess that whether one is considering the crime of murder or the statutory offence, I can find no warrant for giving the words " grievous bodily harm " a meaning other than that which the words convey in their ordinary and natural meaning. " Bodily harm " needs no explanation and " grievous " means no more and no less than " really serious." In this connection your Lordships were referred to the judgment of the Supreme Court of Victoria in the case of MILLER [1951] Vict.L.R. 346. In giving the judgment of the court, Martin J., having expressed the view that the direction of Willes J. could only be justified, if at all, in the case of the statutory offence, said at p. 357 : " It is not a question of statutory construction but a question of the intent required at common law to constitute the crime of murder. And there does not appear to be any justification for treating the expression 'grievous bodily harm' or the other similar expressions used in the authorities upon this common law question which are cited above as bearing any other than their ordinary and natural meaning." In my opinion, the view of the law thus expressed by Martin J. is correct and I would only add that I can see no ground for giving the words a wider meaning when considering the statutory offence.

It was, however, contended before your Lordships on behalf of the respondent that the words ought to be given a more restricted meaning in considering the intent necessary to establish malice in a murder case. It was said that the intent must be to do an act " obviously dangerous to life " or " likely to kill." It is true that in many of the cases the likelihood of death resulting has been incorporated into the definition of grievous bodily harm, but this was done, no doubt, merely to emphasise that the bodily harm must be really serious, and it is unnecessary, and I would add inadvisable, to add anything to the expression " grievous bodily harm " in its ordinary and natural meaning. To return to the summing-up in the present

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case, it is true that in the two passages cited the learned judge referred to "grievous bodily harm" in the terms used by Willes J. in ASHMAN (*supra*), but in no less than four further passages and in particular in the vital direction given just before the jury retired he referred to "serious hurt" or "serious harm." Read as a whole it is, I think, clear that there was no misdirection. Further on the facts of this case it is quite impossible to say that the harm which the respondent must be taken to have contemplated could be anything but of a very serious nature coming well within the term "grievous bodily harm."

Before leaving this appeal I should refer to a further contention which was but faintly adumbrated, namely that section 1 (1) of the Homicide Act, 1957, had abolished malice constituted by a proved intention to do grievous bodily harm and that accordingly VICKERS (1957) 41 Cr.App.R. 189; [1957] 2 Q.B. 664, which held the contrary, was wrongly decided. As to this it is sufficient to say that in my opinion the Act does not in any way abolish such malice. The words in parenthesis in section 1 (1) of the Act and a reference to section 5 (2) make this clear beyond doubt.

In the result the appeal should, in my opinion, be allowed and the conviction of capital murder restored.

LORD GODDARD: My Lords, I agree with the opinion which has just been pronounced.

LORD TUCKER: My Lords, I also agree.

LORD DENNING: My Lords, I agree.

LORD PARKER OF WADDINGTON: My Lords, I also agree.

Appeal allowed.
Conviction of capital
murder restored.

Solicitors: Prothero and Prothero, for the respondent.

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